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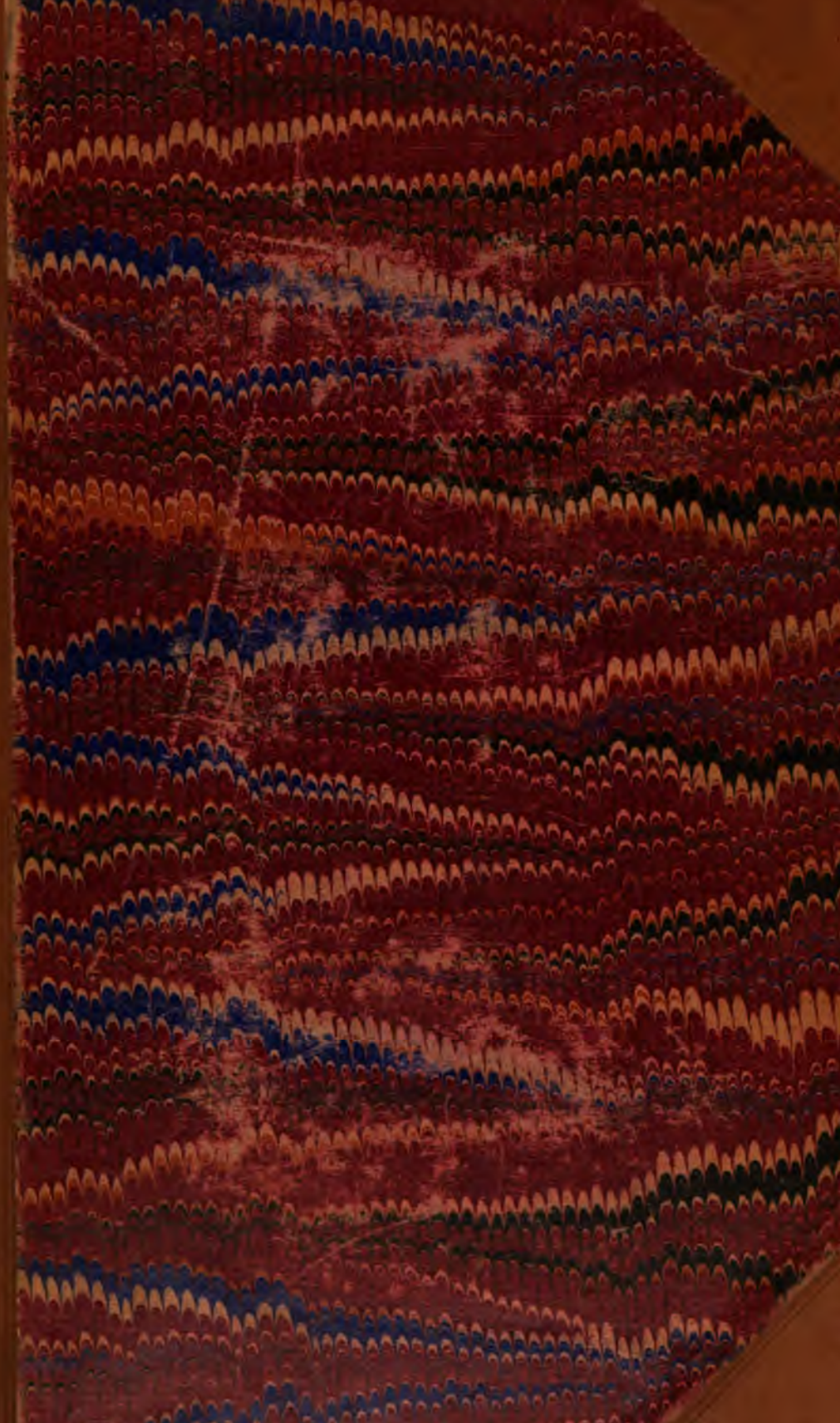
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BY

JAMES KIRBY, D.C.L., LL.D.,

Advocate.

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THE

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The Legal News.

VOL. XIII. JANUARY 4, 1890. No. 1.

Mr. Justice Bossé observed, last term, in *Corp. of Sherbrooke & Dufort*, referring to the three months prescription of C. S. C. cap. 85, "Cette loi est dure, elle devrait probablement disparaître de nos statuts." In effect, it seems like a mockery of justice to tell the maimed or mutilated victim of somebody's carelessness or neglect, that he has lost all recourse because his proceedings were not commenced within three months from the time of the injury. It might easily happen that the injured person would be in such a condition during the ninety days as to be unable to realize his position or to seek advice as to his remedy. He is not even as favourably situated as a minor or an interdict; he has no tutor or curator to act for him. And when he has sufficiently recovered to be able to reflect and to act, he is told that his remedy is irretrievably lost. A tradesman may let an account sleep in his books twenty times three months, before his action is barred, but the victim of a horrible accident is bound to act at once—perhaps before the precise extent of his injury can be ascertained. The hardship, of course, is all the greater, when, after succeeding in proving his case in the Court below, he is met with the defence of prescription on the appeal.

The exclusion of the bar and the general public from the Court, during the trial of a libel case (see p. 412 of last volume), is a startling novelty to the English lawyer, and, as will be seen by the opinion published on another page, the leading member of the profession has declared that Mr. Justice Denman was not 'legally justified' in making the order. If injury would have resulted to third parties from the admission of the bar to the trial of *Malan v. Young*, that would be a strong ground for making a precedent for trying the case *in camera*. We presume that the order would have been futile if the bar

had not been excluded as well as the general public. This reminds us of a case about fifteen years ago in Montreal. It was not a libel case, but an ordinary action, by the vendors of real estate, to compel a purchaser to take a deed of lots sold to him. The late Mr. Justice Torrance, who was trying the case, for some reason not clearly apparent, or which we have forgotten, made an order prohibiting the taking of notes of the evidence by reporters. This ruling caused some astonishment at the time; and it was perfectly futile, for the newspapers continued to publish more or less complete summaries of the evidence; and, after a day or two, the learned judge, probably becoming convinced that the order could not be justified, voluntarily rescinded it. Mr. Justice Denman in the present case is in a much stronger position. He did not make the order without conferring with other judges; it was made at the suggestion of counsel, and with the consent of both parties; so that there can be no suggestion that justice will not be done. On the other hand, it appears that Parliament deliberately rejected a clause providing that the Divorce Court might hold its sittings with closed doors when for the sake of public decency it should so think; and the Courts are usually careful to avoid any conflict with the unmistakable will of the legislature.

COURT OF QUEEN'S BENCH— MONTREAL.*

Partnership—Participation in profits—Arts.
1830, 1831, C. G.

The appellant lent \$3,000 to P., to start him in business, which was carried on under the name of P. & Co. By the agreement, appellant was to have six per cent. interest on the amount of the loan, and P. was to draw \$800 per annum for living expenses. At the expiration of seven years, or on the death of P. before that time, the appellant was to get back the amount of his loan, and the net profits of the business were to be equally divided between appellant and P.

Held.—That a partnership was created,

* To appear in Montreal Law Reports, 5 Q.B.

"I have been thinking of you
 from the time I saw you
 happen to be in such a
 state of mind as to be unable to
 seek advice as to how to
 get on as favourably
 as possible; he has
 been. And when
 you are able to
 get on as favourably
 as possible, you may be
 in a better position
 to be able to
 get on as favourably
 as possible.

(continued from page 60)

The Legal Press

JANUARY 4, 1891

No. 1. — *Notice aux abonnés.* — Les abonnés à l'année 1891 ont été avisés par la poste, le 15 décembre 1890, que leur abonnement était en règle. Les abonnés qui n'ont pas reçu de notice, ou qui ont payé leur abonnement par mandat, sont priés de se faire connaître à l'administration, afin qu'ils puissent recevoir leur journal. Les abonnés qui ont payé leur abonnement par mandat, sont priés de se faire connaître à l'administration, afin qu'ils puissent recevoir leur journal. Les abonnés qui ont payé leur abonnement par mandat, sont priés de se faire connaître à l'administration, afin qu'ils puissent recevoir leur journal.

M. Bossé observed, last term, in *Brooke & Dufort*, referring to the prescription of (C. S. C. cap. 80, art. 1000, *elle devrait probablement être statuée.* In effect, it seems to me that the malice of somebody's carelessness has lost all its value. It was not common that the time of the happening of the fact was not a condition of the prescription. It was not a condition of the prescription. It was not a condition of the prescription.

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Würtele, J.,

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, 23 avril 1889.

, J.

UES D'ECOLE POUR
A PAROISSE DE ST-

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ur une procédure inci-
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rsuivent le défendeur,
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Laurent.
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e action. Il produit d'a-

and appellant became liable for the debts of the business.—*Davie & Sylvestre*, Tessier, Cross, Baby, Church, Bossé, JJ., Sept. 23, 1889.

Tutor and minor—Loan to minor—Arts. 297, 298, C. C.—Obligation void for violence and fear—Arts. 994–996, C. C.

Held:—1. (Affirming the decision of the Court below), That a person lending money to a minor is bound at his peril to see that the authorization to borrow is regular on the face of it; and where no proper summary account was submitted by the tutor, as required by Art. 297, C.C., and the sub-tutor was moreover the agent and son of the lender, and was bound to know that in fact the loan was not required by the minor, but was being improperly obtained by the tutor for his own purposes, the obligation so given was held null and void.

2. (Reversing the judgment of the Court below), That threats to a woman in a weak state of health, and feeble bodily and mentally, that she would be turned out of her property, unless she signed an obligation and hypothec, constituted violence and fear within the meaning of Arts. 994, 995 C. C., and were a cause of nullity in the obligation executed in such circumstances, and without consideration.—*Kerr & Davis*, and *Davis & Kerr*, Tessier, Cross, Church, Bossé, Doherty, JJ., (Tessier and Bossé, JJ., dissenting on appeal of Kerr, and Tessier, J., diss. on cross appeal), May 28, 1889.

Servitude—Moulin banal—Obligation of riparian owners—Right of Co-proprietorship.

Held:—1. The *droit de banalité* under the old law was a servitude which imposed on riparian owners the obligation of permitting on their land the construction of the dam (*chaussée*) necessary for the working of a *moulin banal* of the seignior; and when the seigniorial tenure was abolished, the seignior remained sole owner of the mill and the dam.

2. While every riparian owner has the right to use the water of a stream adjoining his land, on condition of returning it to the stream at its exit from the land, he is not

entitled to draw off water from a dam belonging to another, for irrigation or manufacturing purposes.

3. Joint use of a thing where one of the parties enjoys the use under a title obliging him to pay an annual sum for such use, cannot confer a right of co-ownership, however long such joint use may have lasted.

4. The right of the owner of the saw-mill in the present case was limited to the use of the surplus water not required for the operation of the *moulin banal*; but the plaintiff having wholly denied his right to use the water, the action was dismissed, the Court reserving to plaintiff the right to establish the limitation.—*Archambault & Poitras*, Tessier, Cross, Bossé, Doherty, JJ., Jan. 23, 1889.

Executrix—Liability for misappropriations of agent.

Held:—(Affirming the decision of Johnson, J., M.L.R., 4 S.C. 92), That while an executrix who is also appointed administrator of the estate for a long term of years, has power to substitute another person for the management of the affairs of the estate, the executrix is bound to exercise supervision over the acts of the person so appointed, and cannot divest herself of her personal responsibility if she fails to take all due precautions.

2. An executrix cannot escape liability for the misappropriations committed by her agent, by simply establishing that such agent was a notary of excellent standing in the community; and the immunity granted to the mandatory empowered to substitute (under Art. 1711, C.C.) does not apply to a testamentary executrix.

3. In the present case the executrix had acted carelessly and without due precaution in making cheques payable to her agent instead of to the borrowers on the proposed mortgages, and in signing deeds without sufficiently examining their contents.—*Low & Gemley*, Tessier, Baby, Church, Bossé, JJ., Nov. 23, 1889.

SUPERIOR COURT—MONTREAL.*

Review—Town Corporations—Judgment on petition to annul resolution of County Council—R. S. 4376, 4614.

* To appear in Montreal Law Reports, 5 S.C.

Held:—That a judgment of the Superior Court, under the Town Corporations General Clauses Act, 40 Vict. c. 29, s. 200, (R. S. 4376), upon a petition to set aside a resolution of a county council on the ground of illegality, is a judgment respecting municipal matters, and is not susceptible of revision before three judges. R. S. 4614. — *McConnell v. La Corporation de la Ville de Lachute*, in Review, Johnson, Davidson, de Lorimier, JJ., June 22, 1889.

Railway—Highway crossing—Negligence—Verdict against evidence—New trial.

The husband of plaintiff was struck by an outgoing train and killed, while attempting to cross the tracks where the highway was intersected by the railway. The evidence was to the effect that he persisted in crossing notwithstanding the warning of the guardian; the gate was closed; there was day-light; the bell of the engine was ringing; and the approaching train could be seen for three-quarters of a mile from the place of the accident. The jury found for the plaintiff.

Held:—That the verdict was against evidence, it being clearly proved that the deceased had not exercised ordinary care; and a new trial was ordered.—*Curran v. G.T.R. Co.*, Loranger, Würtele, Davidson, JJ., June 8, 1889.

Carrier—Bill of lading—Condition.

Held:—That the condition on the back of a through bill of lading, relieving a railway company from responsibility as soon as goods entrusted to them for carriage have been delivered to the next succeeding carrier at the extremity of the line of the railway company issuing said bill of lading, is a legal and reasonable condition, and is binding on the shipper who either has, or from the circumstances is presumed to have, knowledge thereof, and to have accepted the contract subject to such condition.—*Beaumont v. C.P.R. Co.*, Jetté, J., Oct. 29, 1889.

Costs—Commission Rogatoire—Fees of Solicitors on open Commission.

Held:—That where the parties consent to the substitution of an open commission for the examination of witnesses at a distance, in lieu of a commission in the ordinary form,

the fees of counsel conducting the *enquête* before the commissioner will be taxed as costs in the case.—*Pictou Bank v. Anderson*, Jetté, J., Dec. 14, 1889.

Principal and Agent—Fraud—Transfer of fire insurance—Agent, Powers of—Art. 1735, C.C.

The defendant, an insurance broker, was the agent of two insurance companies, one of which instructed him to cancel a certain risk in Montreal. After asking for a reconsideration, and the order being repeated, he complied, and then transferred the insurance to the other company for which he was agent. He did this without the knowledge of the insured. The same day a fire occurred, and the loss was paid by the company to which the insurance was transferred. In an action by the latter against the agent, for fraudulently making them responsible for the loss:

Held:—That the transfer of the insurance was made by the defendant in good faith and in accordance with the custom of insurance brokers in Montreal, and although not authorized by the insured, it was competent for the agent to act as the mandatary of the company and of the insured.—*Connecticut Fire Insurance Co. v. Kavanagh*, Würtele, J., Nov. 14, 1889.

COUR DE CIRCUIT.

MONTREAL, 23 avril 1889.

Coram OUMET, J.

OUELLET V. LES COMMISSAIRES D'ÉCOLE POUR LA MUNICIPALITÉ DE LA PAROISSE DE ST-LAURENT.

Rôle de cotisation scolaire—Validité—Contestation.

JUGE:—*Qu'on ne peut, par une procédure incidente, attaquer la validité d'un rôle de perception scolaire.*

Les demandeurs poursuivent le défendeur, pour la réclamation d'une taxe scolaire de \$54.92, tel que porté au rôle spécial de cotisations pour la construction d'une maison d'école dans l'arrondissement numéro huit de la paroisse de St-Laurent.

Le défendeur a produit deux plaidoyers à l'encontre de cette action. Il produit d'a-

bord une exception péremptoire temporaire en droit, alléguant : qu'avant la création de l'arrondissement numéro huit, tout cet arrondissement était compris dans l'arrondissement numéro trois de la municipalité scolaire de la paroisse de St-Laurent, et que partant l'arrondissement numéro huit n'était qu'un démembrement de l'ancien arrondissement numéro trois ; qu'avant ce démembrement tous les propriétaires contribuables du dit arrondissement numéro trois avaient fait bâtir une maison d'école à frais commun qui existait encore lors du démembrement et dont la valeur était, à peu près, la même que lors de la construction qui en avait été faite ; que par la création du nouvel arrondissement numéro huit, la partie où se trouve située la dite maison d'école, savoir, le reste de l'ancien arrondissement numéro trois, a gardé la propriété de cette maison ; que les demandeurs devaient d'abord faire remise au nouvel arrondissement numéro huit d'un montant qui devait être établi *au pro rata* de l'évaluation foncière des propriétaires intéressés ; que le montant de cette remise devait être déduit du prix de la construction de la nouvelle maison d'école, et que le rôle spécial qui devait être fait pour payer cette nouvelle construction ne devait être que pour la balance restant due, déduction faite de la remise que les demandeurs devaient imposer à la balance de l'ancien arrondissement numéro trois ; que, par conséquent, le rôle spécial sur lequel est basée la présente action est irrégulier, illégal, nul, de nul effet, et la présente action doit être déboutée sauf recours sur un nouveau rôle à être préparé d'après la loi.

Sans préjudice à ce que ci-dessus plaidé, le défendeur a ensuite produit une défense spéciale alléguant le même fait, et alléguant de plus que, déduction faite du montant de la dite remise, le montant que le défendeur aurait eu à payer n'aurait pas dépassé \$30 ; que le défendeur a toujours été prêt à payer ce montant ; que le défendeur offre de confesser jugement pour ce montant de \$30, pourvu que les demandeurs lui donnent sa quittance pour le montant. Et le défendeur demande acte de cette déclaration, qu'il est prêt à confesser jugement pour une somme de \$30 sans préjudice à son premier plai-

doyer, et conclut au débouté de l'action quant au surplus, avec dépens distracts.

A cette exception péremptoire, les demandeurs ont opposé une réponse en droit et une réponse générale en fait.

La réponse en droit allègue : Que le défendeur n'a jamais porté aucune plainte auprès des demandeurs ou de leur secrétaire pendant les trente jours pendant lesquels le rôle était entre les mains du secrétaire-trésorier pour inspection, après avis légalement donné, et qu'il n'a pas porté plainte lors de l'homologation du dit rôle ; qu'aucune plainte, ni appel n'ont jamais été portés auprès du surintendant de l'instruction publique de cette province relativement au dit rôle, ni auprès du conseil de l'instruction publique, ni auprès de cette Cour.

Les demandeurs ont produit une réplique générale à l'encontre de la défense spéciale du défendeur, et demandé acte des confession et admission du défendeur.

Tous ces plaidoyers du défendeur ont été renvoyés, et jugement pour la somme de \$54.92, montant porté au rôle, a été accordé aux demandeurs avec intérêt et dépens.

J. H. Migneron, avocat des demandeurs.

Laflamme, Madore & Cross, avocats du défendeur.

(J. J. B.)

CIRCUIT COURT, BEAUHARNOIS.

HUNTINGDON, Sept. 10, 1889.

Coram BELANGER, J.

MOODY *et al.* v. THORNTON, & WHITE, opposant.

Opposition—Dismissal on motion—Art. 135, C.C.P.

Held:—*That an opposition which is vague and insufficient on its face may be dismissed on motion.*

The opposant White alleged in his opposition that he was the owner of a certain mare mentioned in the *procès verbal* of seizure in the cause, and that this animal was not seized in the possession of the defendant.

Plaintiffs moved to reject the opposition, on the ground that inasmuch as the opposant had not alleged that the mare in question had been seized in his possession, and did

not set up any title by which he pretended to claim ownership, the opposition was vague, and should be dismissed. He cited in support of his motion, Art. 135, C. C. P.

Motion granted.

A. E. Mitchell, for Plaintiffs contesting.
MacLaren, Leet & Smith, for Opposant.
(C. J. B.)

ENGLISH AND FRENCH LAWYERS.

At the annual provincial meeting of the Incorporated Law Society (England), Mr. F. K. Munton, of London (Oct. 16), read a paper entitled 'English and French Lawyers,' in the course of which he said:

In France the legal practice is separated into three divisions, for, besides the criminal and ordinary civil jurisdiction, there is a special division for dealing with cases of a purely commercial character. Over the latter, the Tribunals of Commerce have exclusive control. All other civil matters are dealt with by the Civil Courts properly so called. In the Civil Courts the judges are appointed by the State, and hold their office for life as in England, whereas in the Tribunals of Commerce the judges are not professional lawyers, but merchants elected by fellow-merchants of the district. The order of things as regards the legal profession in France is very different from that prevailing in England. The business of an English solicitor, in fact, is split up and divided in France among *avocats*, consulting *avocats*, *avoués*, *agréés*, *notaires*, *huissiers*, and *agents d'affaires*, and there is nothing to prevent unlicensed and possibly wholly unqualified practitioners from doing much from which they would be excluded by our English system. The *avoué*, the nearest correlative of an English solicitor, performs a very small part of the work of the latter, as we understand it. There are in Paris 200 *avoués*, 125 *notaires*, 15 *agréés*, 150 *huissiers*, sixty *avocats à la Cour de Cassation*, and 800 *avocats* inscribed at the bar. The exact number of uninscribed practitioners is unknown, but is supposed to be about 5,000. At all events, it vastly exceeds that of all the *notaires*, *avoués*, inscribed *avocats*, *agréés*, and *huissiers* put together. It is an undisputed fact that the

great bulk of legal business which would be carried on in London by solicitors is done in Paris by persons who are subject to no qualifications in the legal sense of the word, and whose agency is subject to no direct check or control. Any person can, in fact, exercise the profession of the law, excluding actual procedure, a portion of conveyancing, pleading in Court, and the serving of process. For all France the number of recognised practitioners doing solicitors' work is about 9,000 *notaires*, 2,500 *avoués*, and 5,000 *huissiers* (the number of *avocats* is not on record)—in all, under 17,000. In England we have some 14,000—i.e. one to about 1,700 inhabitants, the proportion in France being one to about 2,100 inhabitants. If, however, the unregistered practitioners in France be added, the proportion would be sensibly raised there. Closely connected with the distinction between the French and English systems of legal agency is the difference between the two countries in the organisation of justice, which is as strongly decentralised in France as the rest of the administration of the country is centralised. All of us here know that the High Court of Judicature in London has unrestricted jurisdiction throughout England and Wales. It is true that County Courts, and a few local Courts, have statutory or customary jurisdiction in certain classes of cases; but, speaking generally, it is every Englishman's right to demand justice in London, or by the judges from London on circuit. France, on the contrary, is divided into limited jurisdictional areas, called appeal districts, and these again into subdivisions in which the Courts of First Instance have exclusive jurisdiction. The departments are grouped into twenty-six such appeal districts, a chief town in each of them being the seat of the Appeal Court. Each appeal district is complete in itself. There is no appeal beyond the limit of the district, nor can a case be removed from the district in which the cause of action arose. The Courts of First Instance (civil and commercial tribunals) differ from the English County Courts inasmuch as all causes, whatever the amount at issue or nature of the suit, are subject to their jurisdiction. Such jurisdiction, moreover, is final in all matters involving

less than 1,000*l.* (£40), or where property is concerned involving a rent of less than 60*l.* There is a civil tribunal of First Instance in every *arrondissement*, and there are 362 *arrondissements* in France. Thus each *arrondissement*, with the exception of two in the neighborhood of Paris, possesses a Court with unlimited jurisdiction in all matters, whatever the issue, in its own area. There are tribunals of commerce in the 213 towns which are of sufficient trade importance to warrant the existence of a special tribunal. Where there is no tribunal of commerce, the civil tribunal exercises commercial jurisdiction in its stead. Below the civil tribunals of First Instance there is a Court which is composed of a single stipendiary, *juge de paix* (not to be confounded with the English J.P.), a tribunal with jurisdiction up to 1,500 francs, and without appeal under 100 francs, and below the tribunals of commerce the *Conseils de Prud'hommes*. The latter are Courts composed of masters and workmen in equal numbers, for the settlement of disputes between employers and employed, with jurisdiction which is final in matters involving less than 200 francs, and subject to appeal to the tribunal of commerce of the district in matters involving a larger amount. There is a *Juge de Paix* Court in each of the 2,868 cantons in France; but neither these Courts nor the *Conseils de Prud'hommes* much concern lawyers, for the parties usually appear in person, and the recognized legal profession has little to do with them. Only the larger civil tribunals of first instance have a bar. The *avoués* attached to them, like the *agréés* in the tribunals of commerce, which have adopted the institution of *agréés*, do the work of barrister and solicitor in the same way as solicitors in England do the bulk of the County Court work. The result of this decentralisation is strongly marked in Paris. In London we have 5,000 solicitors and 3,000 barristers—in all some 8,000 persons—practising the law, whereas in Paris the recognized practitioners doing solicitors' work number only 550, and barristers' work 800—*i.e.* 1,350, or about one-sixth of the number in London; so that, even adding the supposed number of unrecognized practitioners, the total (allowing

for the difference in population) is still a long way from that in London. The decentralisation of justice in France affects the social position of the bar, for, with the exception of that of Paris, it is much behind the English bar. In England, as the only avenue to great judicial office, the bar enjoys a prestige far beyond the Paris bar, the French bench being recruited without reference to distinction at the bar. The office in France of public procurator (usually, but erroneously, called in England 'public prosecutor') is the keystone of the administration of criminal justice in France. There is nobody analogous to this official in England, except, in some respects, the Queen's Proctor in the Divorce Court. The English Public Prosecutor or the Scotch Procurator-Fiscal performs only a small portion of the functions exercised (as the name '*ministère public*' indicates) by the French public procurator. In criminal matters he is the only prosecutor. The repression of crimes is a public interest, and in France private persons can only lodge their denunciation or complaint with the procurator. It is in his discretion to decide whether a criminal offence has been committed, and, if it has been committed, to bring the offender to justice. Complainants can prefer a civil claim, and thus actively support the prosecution in Court; and on civil claims being joined with the criminal issues, the same judgment deals with both. In civil matters the public procurator holds a sort of watching brief in the public interest. Owing to the active and individual nature of his office, he has constant opportunities of bringing his abilities under notice, and he is eligible for every judicial office. In France they have a Minister of Justice, who more than represents our Lord Chancellor. After him comes the Procurator-General of the Supreme Court of Appeal, whose deputies are the advocates-general of that Court. Lastly, in the civil tribunals of first instance there are a procurator-general and his substitutes. Every deputy of the procurator of the Republic must have passed the bar examinations and have spent two years in chambers before he becomes eligible for appointment. This, however, is all the connection with the bar he need have. From these substitutes

all other judicial officers are more or less recruited. The only place where the position of the three branches of the legal profession in France—bench, bar and solicitors—presents analogies to the position of things in England is Paris. There the bar enjoys greater prestige than in any other judicial centre in France; the judges are better paid than in other places, and the division of labor is most strongly marked. The *esprit de corps* of the Paris bar, the stringency of their code of honor, their professional etiquette, the strict supervision exercised by their disciplinary council, equivalent to our benchers, are as great as those in England. The bar of Paris is subject to antiquated rules like our Inns of Court. *Avocats* cannot sue for their *honoraires* (they are even prohibited from receiving them by cheque to order), and they are bound to communicate and lend to each other documents to be used at the trial without written acknowledgment.

THE ATTORNEY-GENERAL'S OPINION ON SITTINGS IN CAMERA.

The following questions and opinion have been published by Messrs. Geare, Son & Pease, of 57 Lincoln's Inn Fields:—

QUESTIONS.

1. Is there any precedent for the exclusion (1) of the members of the bar or (2) of the general public from being present in court at the trial in question, and had the learned judge, under the circumstances hereinbefore mentioned, any jurisdiction to exclude either the bar or the public from attending the trial?

2. Are there any proceedings by which the validity of the learned judge's order, under which Mr. Gould was compelled to leave the court, can be questioned, and, if so, what are such proceedings?

ANSWERS.

1. We know of no precedent for the exclusion of the members of the bar or the general public from the hearing in court of an action such as the one in question, and we are of opinion that as the law now stands, under the circumstances of the case, as stated by

the learned counsel for the plaintiff and defendant respectively, the learned judge was not legally justified in excluding the general public or Mr. Charles Gould. In our opinion, the members of the bar, when not engaged in the business before the Court, have not in point of law any higher right to be present at trials than the general public.

2. We are of opinion that the order of the learned judge, under which Mr. Gould was excluded from the Court, cannot be questioned by actions in the courts or by any similar legal proceeding. A judge of the High Court cannot, in our judgment, be sued in the Court for words spoken or acts done in the course of his judicial functions, and the officials who carry out the orders of a judge, given in the apparent exercise of his functions, have, in our opinion, a similar immunity. No fine was imposed upon Mr. Gould; consequently, he is unable by legal proceedings questioning the punishment inflicted, to question indirectly the order of which he complains.

3. We desire to point out that the exclusion of a particular portion of the public, such as women and children, from trials in which evidence of an indecent character, difficult to bring out in detail before them, is to be given, rests upon long usage and upon principles which in no way affect, in our opinion, the present case, and that we entertain no doubt of the legality of that practice, or of the power of a judge to decide for himself as to its application.

RICHARD E. WEBSTER.

KENELM E. DIGBY.

CYRIL DODD.

Temple, December 9.

I desire to add to the above opinion that if in any case the presiding judge should be satisfied that the bringing out of the facts of a case would be so detrimental to public morality as to make it a matter of serious difficulty for the truth to be ascertained, and thereby prevent justice being done, in my opinion, in such a special case he might be justified in excluding the public; but no such reason was suggested in the present instance.

RICHARD E. WEBSTER.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 28.

Judicial Abandonments.

James G. Armstrong, doing business under the name of "The Armstrong Photographie Co.," Montreal, Dec. 19.

Pierre Blais, trader, Ste. Flore, Co. of Champlain, Dec. 24.

Didace Bonin, contractor, parish of St. Antoine, Dec. 20.

Aldéma Bourbonnais, tanner, parish of Ste. Marthe, Dec. 12.

J. Emile Caron, dry goods merchant, Quebec, Dec. 23.

Onésime Cartier, jr. grocer, Montreal, Dec. 24.

P. C. d'Auteuil & Co., dry goods merchants, Quebec, Dec. 21.

Elmire Duperré, doing business as E. D. Marceau, Pisle Verte, Dec. 19.

James Stewart Kennedy, trader, Knowlton, Dec. 20.

Napoléon McCready, trader, St. Romuald, Dec. 24.

Antoine Trahan, mill-owner and trader, township of Weedon, Dec. 24.

Curators Appointed.

Re Clovis Arcand, wheelwright, Portneuf.—H. A. Bedard, Quebec, curator, Dec. 23.

Re Samuel S. Armstrong, trader, Oranbourne.—H. A. Bedard, Quebec, curator, Dec. 21.

Re A. S. de Carufel, Maskinongé.—Bilodeau & Renaud, Montreal, joint curator, Dec. 21.

Re Emery Faneuf, St. Hugues.—J. Morin, St. Hyacinthe, curator, Dec. 21.

Re L. L. Gailloux, Three Rivers.—Kent & Turcotte, Montreal, joint curator, Dec. 18.

Re Hormidas Gendron, trader, St. Dominique.—J. O. Dion, St. Hyacinthe, curator, Dec. 21.

Re Maxime Guérin, St. Philippe.—Kent & Turcotte, Montreal, joint curator, Dec. 14.

Re Fabien L. Guertin.—John Fulton, Montreal, curator, Dec. 28.

Re Valois, Lusignan & Co.—Kent & Turcotte, Montreal, joint curator, Dec. 21.

Re H. Macfarlane & Son, contractors, Toronto, and Carleton, P.Q.—A. F. Riddell and Thomas Watson, Montreal, joint curator, Dec. 23.

Re Alex. Maheu, St. Chrysostôme.—Kent & Turcotte, Montreal, joint curator, Dec. 23.

Re John C. Moors.—C. S. Milette, Richmond, curator, Dec. 14.

Re Mullarky & Co., boot and shoe manufacturers, Montreal.—W. A. Caldwell, Montreal, curator, Dec. 19.

Re Robert Neill, Sheffington.—A. W. Stevenson, Montreal, curator, Dec. 21.

Re George St. Jorre & Co., grocers, Quebec.—H. A. Bedard, Quebec, curator, Dec. 21.

Dividends.

Re Hormidas Bachand, St. Liboire.—First and final dividend, payable Jan. 14, J. Morin, St. Hyacinthe, curator.

Re J. W. Barrette.—First and final dividend, payable Jan. 15, C. Desmarceau, Montreal, curator.

Re Frank and Thomas Décost, pump manufacturers.

—First and final dividend, payable Jan. 13, R. S. Joron, Salabery de Valleyfield, curator.

Re J. A. Leguerrier, Ste. Thérèse.—First dividend, payable Jan. 5, Bilodeau & Renaud, Montreal, joint curator.

Re Sénécal & Frère.—First and final dividend, payable Jan. 14, C. Desmarceau, Montreal, curator.

Separation as to Property.

Emilie Chalifoux vs. François Xavier Trudeau, tailor, Montreal, Dec. 23.

Azilda Côté vs. Jean Baptiste Dubreuil, trader and mill-owner, parish of St. Dominique, Dec. 26.

Evelina Picard vs. Louis Bigras, Montreal, Oct. 31.

Angelina Sabourin vs. Salomon Adams, trader, Montreal, Dec. 23.

GENERAL NOTES.

THE BURIAL ACT AND A 'FELONY'—In a village near Manchester recently, a person shot a bank manager and then, in order to escape capture, shot himself. Of course an inquest was held, and the jury returned a verdict of *felo de se*. Such a suicide would in former days have been buried in a very unceremonious manner. Since the Burials Act, 1890, however, such a case has been provided for by section 12 of that Act. That clause provides that where the ordinary service may not be used, and in any other case at the request of the relative, friend, or legal representative having the charge of or being responsible for the burial of the deceased, it shall be lawful for any minister in holy orders of the Church of England to use at the burial such service consisting of prayers taken from the Book of Common Prayer and of portions of Holy Scripture as may be prescribed or approved by the Ordinary. Such a service has been used in some dioceses, and of course its use is a great solace to the deceased's friends.—*Mr. Utley in London Law Journal*.

PUNISHMENT SUITED TO OCCUPATION.—In the recent English case of *Gardner v. Bygrave*, which was an action of assault and battery brought by a pupil against his school-master for caning him on the hand, Mr. Justice Mathew made a joke which the *Saturday Review* regards as a "shining instance of how the tedium of legal proceedings may be profitably relieved, and the principles of law aptly illustrated by a really ready and witty observation." It was admitted on all hands that assuming caning on the hands to be a proper mode of punishment, the caning in question was a good and lawful one. The plaintiff's counsel, in an argument of a distinctly *à posteriori* character, contended that the lawfulness of caning on the hand depended on the occupation of the boy when out of school, and that the defendant ought to have enquired into the plaintiff's employment. "If he worked with his hands, such a punishment might seriously interfere with his occupation. Punishment might be inflicted elsewhere"—whereupon the court asked, "What if his occupation were sedentary?" It was ultimately decided that caning on the hand, when properly done and for a proper reason, is lawful.—*Harvard Law Review*.

The Legal News.

VOL. XIII. JANUARY 11, 1890. No. 2.

A gentleman down in Virginia, in an article entitled 'Sacking the Temple,' laments the ruin which codification must work to the stately edifice of the common law. In phrase somewhat stilted he exclaims: "The splendid columns, the massive pilasters, that supported the grand temple, have been moved, and the structure is slowly and inevitably crumbling away. Modern hands must build a modern structure, but the startling announcement has been made that these iconoclasts must build the structure anew from the rubbish of the old; soiled, marred, defaced, impaired, scarred and demolished, though it has been from the fall. And where is their architect, and where are their skilled artificers and mechanics? The acanthus leaves from the Corinthian capital will find a place on the head of the sculptured Centaurs from the Doric Parthenon. The fluted columns of the Roman Parthenon will sustain the gothic gable, instead of the portico. Some mossy boulder from a Teutonic stronghold will be laid upon the volutes of the Greco-Gothic structures of France; and from the ruins of this great fallen structure we will trace the indiscriminate composite of the legal architecture of every civilized nation, placed without form, forbidding, gloomy, mossy, cold; frequented only by the owls of the profession who constructed it; the mausoleum of reason, truth and justice." This is a sample of anti-codification extravagancy. On the other hand, the friends of codification are too sanguine in their predictions of what codification will accomplish. For example, the *Albany Law Journal* tells the fervid writer from whom we have quoted, to go to sleep, "and wake up again in twenty years, and we will show him a temple worthy his admiration." The usefulness of codification in respect of many branches of the law cannot be denied. Some of the statutes which exist in countries not under code rule, are in fact sections of a code. Nevertheless, great expectations are not thus far justified

by experience of codes. One test which may be applied—an imperfect one, of course—is whether they diminish the work of the courts. Here in Canada we have two large provinces side by side, one without a code and one which has been governed by a code for nearly a quarter of a century. Is there less litigation in one province than in the other? We do not find such to be the case. In the city of Montreal alone we have ten or twelve judges of first instance constantly occupied with the work which the bar of this district contrive to put before them. Therefore one great argument which the friends of codification in the United States are constantly urging—that it will make the law certain—does not appear to be unassailable. We do not dispute that codification has its advantages; but it must not be forgotten that it has also some drawbacks, as Mr. Bishop very forcibly pointed out in the article quoted in our eleventh volume, p. 76.

Mr. Justice Grantham, in his charge to the grand jury at the Liverpool assizes, referred to the subject of a court of criminal appeal, which has been brought prominently forward since the Maybrick case. After observing that there seemed to be a good deal of misapprehension on the subject in the public mind, his lordship pointed out that the procedure in civil and criminal jurisprudence was totally different. In the former the object of each party was to conceal his hand from the other; in the latter, no evidence could be produced at the trial with which the prisoner was not acquainted. In the vast majority of cases in which prisoners had been found to be innocent after their conviction, that discovery had only been made months or years after the conviction, and a Court of Criminal Appeal could only have re-tried the case with the same set of witnesses and the same circumstances which the first Court had before it. They had, however, a Court of Appeal in the Home Secretary, and he thought the present arrangement was more favorable to the prisoner than if a Court were established. The Maybrick case was cited as an example of the danger of a Court of Criminal Appeal and its prejudicial effect on the prisoner. Any

re-trial or hearing of that case must have proved almost a mockery of justice, so excited were the feelings of the people. Under these circumstances he thought it would be bad for the administration of justice if that change were made, for it would, more than anything else, result in responsibility being taken off the shoulders of the jury and the head of the judge, and the jury and the judge would be less likely to try a charge with the care they now exercised. He was quite certain of this, that in many cases, juries would convict where they now gave the prisoner the benefit of the doubt. In many cases where the jury might think a man guilty, but be somewhat doubtful on the point, they might depend upon it the prisoner would be convicted, and the Court of Criminal Appeal would have to decide whether the verdict was right.

In *Talbot v. Stemmons' Ex'r.*, the Court of Appeals of Kentucky (Oct. 24, 1889) was asked to decide whether an agreement to pay the promisee \$500 if he would never take another chew of tobacco or smoke another cigar during the life of the promisor, was upon a sufficient consideration. The Court held in the affirmative, observing: "There is nothing in such an agreement inconsistent with public policy, or any act required to be done by the plaintiff in violation of law; but on the contrary, the step-grandmother was desirous of inducing the grandson to abstain from a habit, the indulgence of which she believed created a useless expense, and would likely, if persisted in, be attended with pernicious results. An agreement or promise to reform her grandson in this particular was not repugnant to law or good morals, nor was the use of what the latter deemed a luxury or enjoyment a violation of either; and so there was nothing in the case preventing the parties from making a valid contract in reference to the subject-matter."

COURT OF QUEEN'S BENCH—MONTREAL.*

Fraud and simulation—Private writing—Registration.

*To appear in Montreal Law Reports, 5 Q.B.

Held:—That an onerous deed of conveyance of real estate, followed by possession, will not be set aside at the suit of a chirographary creditor as fraudulent and simulated, where the transferor was perfectly solvent at the time the deed was made, though his circumstances became embarrassed before the same was registered five years subsequently.

2. That the date of the deed, which was *sous seing privé*, might be established against a third party by legal proof, and was so proved in the present case.—*Eastern Townships Bank & Bishop*, Dorion, Ch. J., Tessier, Cross, Bossé, J.J., Jan. 23, 1889.

Carrier — Negligence — Presumption — Bill of Lading—Exception—Evidence—Onus Probandi—Art. 1675, C.C.

Held.—1. It is sufficient for the shipper to prove the reception of the goods by the carrier, and that they have not been delivered to the consignee, to place upon the carrier the burden of proving that the loss was caused by a fortuitous event or irresistible force, or has arisen from a defect in the goods or thing itself.

2. The fact that the bill of lading contained a clause exempting the carrier from responsibility for "the acts of God, the Queen's enemies, fire, and all and every the dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind," does not necessarily cast the burden of proof on the plaintiff,—so far at least, as to oblige him to make proof of the carrier's negligence by his evidence in chief.

3. The exception "dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind," covers only such losses as are of an extraordinary nature, or arise from some irresistible force which cannot be guarded against by the ordinary exertion of human skill and prudence.

4. The sinking of a steamer at the entrance to a canal, on a calm, clear night, was not such an accident.—*La Cie de Navigation R. & O. & Fortier*, Dorion, Ch. J., Tessier, Cross, Baby, Bossé, J.J., Sept. 23, 1889.

Attorney—Costs—Distraction—Saisie-arrest.

Held.—1. That distraction of costs granted

to a party's attorney vests the attorney alone with the right to claim such costs, as long as the client has not obtained from the attorney a transfer followed by service on the adverse party.

2. That an execution taken in the name of the attorney *distrayant's* client, against the adverse party, is null, if such execution was not preceded by the transfer and notice above mentioned.

3. That the claim for costs of the attorney *distrayant*, due by the adverse party, is subject to the same laws as apply to ordinary debts with regard to transfer, service and subrogation.

4. That when an attachment by garnishment, *saisie-arret*, has been served upon the judgment debtor for costs, by a creditor of the attorney *distrayant*, the attorney *distrayant's* client cannot by alleging payment by him to his attorney, or transfer by his attorney to him of said costs, claim the same in his own name, to the prejudice of the attorney's seizing creditor, if notice of such payment and transfer has not been served upon the judgment debtor before the attachment by garnishment was issued.

5. That in such a case, the judgment debtor is not obliged, before judgment is rendered upon the attachment by garnishment of the attorney's creditor, to deposit in Court, to be paid to whom it may appertain, the amount of such costs, but on the contrary must retain the same in his own hands, as he is ordered to do by the writ of attachment by garnishment, until the Court may decide thereon.—*Milette & Gibson*, Dorion, Ch. J., Tessier, Church, Doherty, J.J., Feb. 26, 1889.

SUPERIOR COURT—MONTREAL.*

Avoidance of contract made in fraud of creditors
—Arts. 1032, 1034, C.C.—*Assignment of life insurance by a person notoriously insolvent—Rights of creditors.*

Held:—(Affirming the decision of Davidson, J., M. L. R., 4 S. C. 319), 1. That the assignment of a policy of life insurance is governed by the law of the place where the assignment is made, and not of the place

where the policy was issued, or where it is payable.

2. Where a person notoriously insolvent transfers a policy of life insurance to a creditor as collateral security for a pre-existing debt, and the amount of the insurance is received by such creditor after the death of the assignor, any other creditor may bring an action in his own name against such assignee, to set aside the assignment, and compel him to pay the money into Court for distribution among the creditors generally. — *Prentice v. Steele*, in Review, Johnson, Loranger, Würtele, J.J., April 30, 1889.

Interdiction for prodigality—Goods supplied to interdict without authority of curator—Art. 334, C.C.—Lesion.

Held:—That when a person has been interdicted for prodigality, in accordance with the formalities prescribed by law, every one is presumed to have knowledge thereof; and a tradesman, who continues to supply goods on credit to the interdicted person without the sanction of the curator, and to an extent greatly in excess of what the means of the interdicted person would justify, cannot maintain an action against the curator for the value of such goods, even when they are household supplies (such as groceries),—more especially where the curator has made adequate provision for the subsistence of the interdicted person.—*Riendeau v. Turner*, in Review, Johnson, Davidson, de Lorimier, J.J., June 22, 1889.

Limited Partnership—Certificate—False statement—Insufficiency of certificate—Arts. 1871–1877, C.C.

Held:—1. That the contributions of special partners to a partnership *en commandite*, or limited partnership, must be in cash, paid in at the date of formation of the partnership (Art. 1872, C.C.)

2. That in order to obtain the privilege of a limited partnership, the formalities of the special laws relating thereto must be strictly complied with, and a statement in the certificate (dated Oct. 30) which persons contracting such a partnership are bound to sign; to the effect that a special partner had brought \$1,000 into the capital of the firm, whereas

* To appear in Montreal Law Reports, 5 S. C.

this sum was not paid in until Dec. 31 following: was a "false statement" within the meaning of Art. 1877, C.C., and rendered the special partners liable for the obligations of the firm in the same manner as ordinary partners.

3. That a certificate which does not mention the period at which the limited partnership is to terminate, is insufficient, and the partners are liable as ordinary partners.—*Davidson v. Fréchette*, Davidson, J., June 28, 1889.

Libel—Plea of Justification—Truth of Matters Alleged—Compensation of Wrongs.

Held:—1. That a plea of partial prescription to an action of damages for libel is not demurrable on the ground that the matters sought to be prescribed were not alleged as charges of libel, but to show animus;—that being matter of fact, and not of law.

2. That the defendant in an action of damages for the publication of a libel, may lawfully plead the truth of the alleged libel, and that it was published in the interest of the public, and concerning matters of public import; and such allegations, if duly established, constitute a sufficient defence in such case.

3. The defendant may oppose to a demand for damages for libel or slander, the fact that the plaintiff on his part libelled defendant, and that there is *compensation d'injures*, where the attack and defence are alleged to have been simultaneous, as in a discussion between the editors of two newspapers in the columns of their respective journals.—*Trudel v. La Compagnie d'Imprimerie, etc.*, Johnson, J., Jan. 12, 1889.

Procedure—Exception to the form—Power to strike out allegations on motion—Indefinite allegations.

Held:—1. That vague and indefinite allegations in an exception to the form may be rejected on motion of the adverse party.

2. That the allegations of a pleading must be sufficiently clear and distinct to enable the opposite party to reply thereto. And so where an exception to the form alleged that the Act incorporating the plaintiffs was *ultra vires*, because the persons incorporated were

incapable of exercising any civil rights in the province by reason of the vows which they had taken—without specifying the vows—and because the objects of their Society were the promulgation of doctrines contrary to Imperial statutes, set forth in certain works filed as exhibits—without specifying the doctrines objected to,—these and other like allegations were rejected as vague and lacking precision.—*La Compagnie de Jésus v. The Mail Printing Co.*, and *Hon. A. Turcotte*, intervenant, Loranger, J., May 14, 1889.

Lessor and Lessee—Privilege of Lessor—Sublease—Saisie-Gagerie.

The lessee of premises under a written lease for one year, which prohibited subletting, continued to occupy them for a second year under a verbal agreement to pay an increased monthly rental, and with some modification as to the premises leased. In the course of the second year the lessee sub-let the premises and removed the greater part of his effects to other premises. The lessor having seized the effects removed, by *saisie-gagerie par droit de suite*, there being at the time no rent due and exigible:

Held:—1. That the privilege of the lessor for the unexpired period of the lease extends to the effects of the lessee, and also includes the effects of the under-tenant in so far as he is indebted to the lessee; and so long as the under-tenant has sufficient effects upon the premises to secure the rent payable by him to the tenant, and the tenant leaves sufficient effects to secure the difference, the principal lessor has no right to issue a *saisie-gagerie* for rent not due and exigible.

2. Even where the under-tenant has bound himself to pay the tenant monthly in advance, it is sufficient if there are enough movables upon the premises, including those of the under-tenant to the extent of his obligation to the lessee, to secure the whole rent for the remainder of the lease.

Semble, That where there is a written lease, with prohibition to sub-let, and the lessee remains in the premises after the term of the original lease, the parties agreeing verbally to certain modifications, the

stipulation against sub-letting still applies, and the effects of a sub-tenant who enters in contravention of such stipulation, become subject to the principal lessor's privilege in the same manner as those of any other third person.—*Vinette v. Panneton*, in Review, Johnson, Gill, Wurtele, J.J., Nov. 30, 1889.

COUR DE MAGISTRAT.

MONTRÉAL, 2 mai 1889.

Coram CHAMPAGNE, J. C. M.

BEAUCAIRE V. WHELAN.

Dommages—Responsabilité—Négligence contributive.

Jugé:—1. *Que celui qui réclame des dommages causés par la faute grossière, ou par la négligence du défendeur, ou ses employés, doit être lui-même à l'abri d'une imputation semblable.*

2. *Que dans le cas où il y a eu négligence contributive, et que l'accident peut être reproché aussi bien à l'un qu'à l'autre, il n'y a pas droit d'action.*

Il s'agissait d'un accident causé à une voiture par un cheval échappé dans une rue publique, où il avait été par son maître abandonné sans entraves, mais, la preuve fit voir que le demandeur avait lui aussi laissé son cheval seul sur la rue sans l'entrave, et que celui-ci tourna de côté et obstrua la rue en travers, et que c'est dans cette position qu'il fut frappé par le cheval du défendeur.

Action déboutée avec dépens.

Autorités: C. C. art. 1053 et la jurisprudence citée au bas de cet article dans le code de M. de Bellefeuille.

Bérard & Brodeur, avocats du demandeur.

Augé & Lafortune, avocats du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, 5 juin 1889.

Coram CHAMPAGNE, J. C. M.

THEORÉT V. SÉNÉCAL.

Action qui tam—Amendement—Parties en cause.

Jugé:—1. *Qu'une action sous le Code Municipal, pour recouvrer une amende appartenant*

pour moitié au poursuivant et pour moitié à la corporation municipale, intentée au nom du poursuivant seul, est une nullité absolue et qui ne peut être couverte par un amendement permettant de mettre en cause la corporation municipale.

2. *Que cet amendement ne peut être permis parce que l'action telle que prise, était une action personnelle, et qu'en mettant en cause la dite corporation elle deviendrait une action qui tam ou populaire, ce qui en changerait la nature.*

Il s'agit d'une action intentée pour faire condamner le défendeur à l'amende, sous le Code Municipal. L'action était prise au nom du demandeur seul, au lieu de l'être au nom du demandeur et de la corporation de la paroisse de St-Raphaël de l'Île Bizard, où demeurent les parties, et qui par la loi devait avoir la moitié de l'amende.

Le demandeur fit motion pour amender son fiat, le bref et la déclaration, de manière à mettre en cause la dite corporation.

La motion fut refusée, un amendement ne pouvant être permis pour mettre en cause une partie, et changer complètement l'action telle qu'intentée

Motion renvoyée.

Autorités: C. P. C. 49, 51: 5 Q. L. R. 346.

Prevost & Bastien, avocats du demandeur.

Lacoste, Bisailon, Brosseau & Lajoie, avocats du défendeur.

(J. J. B.)

THE LAND LAWS OF THE COLONIES
IN THE JUDICIAL COMMITTEE.

At a time when investments are being made by Englishmen in the colonies, companies are being created with the object of developing remote parts of the world more or less subjected to British rule, and a new world is being discovered in Central Africa, the subject of the land laws in British colonies is not only interesting but of practical importance. Much light is thrown on this subject by three cases in the *Law Journal Reports* for November, decided by the Judicial Committee in April and May last. They come to Whitehall from the ends of the earth—one from Canada, one from New South Wales, and one from Natal—in the shape of problems in the land laws of those

countries which have been solved for them by Lord Watson with the concurrence, in the first case, of the Lord Chancellor, the late Lord Fitzgerald, Lord Hobhouse, and Lord Macnaghten; in the second, of the same councillors, with Sir William Grove substituted for the Lord Chancellor; and in the third, of Lord Bramwell, Sir Barnes Peacock, and Sir Richard Couch. *The Attorney-General of British Columbia v. The Attorney-General of Canada*, 58 Law J. Rep. P. C. 88, deals with the effect of a grant of public lands to the Dominion by the Provincial Legislature, upon the admission of British Columbia into the Dominion, on the rights of the Crown, and particularly of gold-mining. In *Cooper v. Stuart*, 58 Law J. Rep. P. C. 93, the applicability of the rule against perpetuities to colonies, and in particular as against the Crown, and in the circumstances of New South Wales, was decided. In *The Colonial Secretary of Natal v. Carl Behrens*, 58 Law J. Rep. P. C. 99, the effect of a reservation of a right to resume possession in a Crown grant of land and the existence of a duty in the holder, who is deprived of it either with or without compensation, to execute a transfer were determined.

The Columbia case was brought on appeal by special case under a British Columbia Act, and the question raised was, whether the precious metals under certain public lands in that province belonged to that Government or the Government of Canada. Judgment had been given in the first instance for the Attorney-General of Canada. Upon appeal to the Supreme Court of Canada this judgment was affirmed by three judges to two. The judges who formed the majority were Chief Justice Ritchie and Justices Gwynne and Taschereau. The dissentient judges were Justices Fournier and Henry. The public lands in question, on British Columbia being, in 1871, by an Order of Council, made part of the Dominion of Canada were, by Article 11, agreed to be conveyed by that Province to the Dominion Government, in trust, to be appropriated in such manner as the Dominion might deem advisable in furtherance of the construction of a railway to connect British Columbia with the Canadian railway system, which

the Dominion undertook to complete in ten years, being a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty miles on each side of the said line, as might be appropriated for the same purpose by the Dominion Government, from the public lands in the North-West Territories and the Province of Manitoba. Lord Watson, in giving judgment, pointed out that the question whether the precious metals were included in the grant to the Dominion must depend on the meaning to be put on the words "public lands" in Article 11. He lays down that the title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province before its admission into the federal union. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration. According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines Case*, 1 Plowd. 366, all the justices and barons agreed that, in the case of the baser metals, no prerogative is given to the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appeared to the Judicial Committee that a conveyance by the Province of "public lands," which is,

in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. Lord Watson proceeds to deal with the reasoning of the majority of the judges in the Courts below, and admits that if the eleventh Article of Union had been an independent treaty between the two Governments, which obviously contemplated the cession by the province of all its interests in the land forming the railway belt, royal as well as territorial, to the Dominion Government, the conclusion of the Court below would have been inevitable, but the article in question does not profess to deal with *jura regia*; it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues. Their lordships were therefore of opinion that the judgment appealed from must be reversed, and that it ought to be declared that the precious metals within the railway belt are vested in the Crown, subject to the control and disposal of the Government of British Columbia, and they advised Her Majesty to that effect.—*Law Journal*, (London).

THE ELECTRIC WIRES DECISION.

It need not be said that this is a case of very great importance, and while the principles of law laid down by the court as to nuisances are not novel, it is in the application of well-known principles of law to a new state of facts wherein lies the importance of the decision.

As to whether or not a dangerous electric wire is a nuisance under the criminal law, the best answer can be found in section 385 of the Penal Code, which defines a public nuisance.

It is there said that "a public nuisance is a crime against the order and economy of the State, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission—1, annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or

2, unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage a lake or navigable river, bay, stream, canal or basin, or public park, square, street, highway; or, 4, in any way renders a considerable number of persons insecure in life or the use of property."

In Stephen's "Digest of Criminal Law" the English criminal law as to a public nuisance is thus laid down: "Article 187. Every person commits a common nuisance who does anything which endangers the health, life or property of the public, or any part of it. . . . Everything is deemed to endanger health, life or property which in either case is actually dangerous thereto, or which must be so in the absence of a degree of prudence or care, the continued exercise of which cannot reasonably be expected."

Among the illustrations of this last section is given the case of *Lister*, 1 D. & B., C. C. 209. In that case the defendant kept in a warehouse in the city of London, a large quantity of mixture of spirits of wine and wood naphtha, forming a substance more inflammable than gunpowder, and of such a nature that a fire lighted by it would be practically unquenchable. It was held that the defendant in such a case commits a common nuisance, though he uses the most scrupulous care to avoid accidents.

That an act may be sometimes dangerous and sometimes innocent, according as it is negligently or carefully performed, see as to keeping gunpowder, on the one hand, the case of *Bradley v. People*, 56 Barb. 72; on the other, *People v. Sands*, 1 Johnson, 78.—*New York Law Journal*.

TRYING CASES IN CAMERA.

On November 22, before Mr. Justice Cave and a special jury, when the case of *Smythe v. Smythe*, an action by a wife against her husband to recover a sum of money due to her, covenanted to be paid by a separation deed, the husband refusing to pay on the ground of molestation, was called on, Mr. Henn Collins (for the defendant) said: I am instructed to ask your lordship that the case should be heard *in camera*. It is an action between husband and wife, and the evidence

of the children will be necessary. They are wards of Court, and it will be very injurious to the children. I ask your lordship to follow the same course as that pursued in a recent case.

Mr. Bray (for the plaintiff): I do not consent, nor do I see why the case should be tried in *camerd*. These issues have already been tried in another Court, and not then in *camerd*, and why not again?

Mr. Henn Collins: Consent is not necessary.

Mr. Justice Cave: What is the case about? I will look at the pleadings.

Mr. Bray: I believe there is absolutely nothing in this case which will be prejudicial to the children.

Mr. Justice Cave: There is no sufficient reason why this case should not be tried in the ordinary way.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Jan. 4.

Judicial Abandonments.

Leonidas A. Bergevin, dry goods merchant, Quebec, Dec. 28.

Rémi Bernard, contractor and builder, St. Hyacinthe, Dec. 27.

George White McKee, Corticook, Dec. 28.

Curators appointed.

Re Aldéma Bourbonnais, tanner, Ste. Marthe, Dec. 30.

Re Auguste Charbonnier, doing business under the name of Hélène Chalifour.—Kent & Turcotte, Montreal, joint curator, Dec. 27.

Re Ambroise De Blois, grocer, St. Sauveur, Quebec.—N. Matte, Quebec, curator, Dec. 31.

Re Philias Desormier.—Kent & Turcotte, Montreal, joint curator, Dec. 27.

Re James Stuart Kennedy.—R. N. England, Knowlton, curator, Dec. 31.

Re F. X. Lepage, dry goods, Quebec.—H. A. Bedard, Quebec, curator, Dec. 31.

Re Elie Rochoon, carter, Ste. Cunégonde.—T. Gauthier, Montreal, curator, Dec. 27.

Re F. X. Trudeau, Montreal.—Kent & Turcotte, Montreal, joint curator, Dec. 29.

Dividends.

Re D. Z. Bessette, Montreal.—First and final dividend, Kent & Turcotte, Montreal, joint curator.

Re Joseph Donati, jeweller, Quebec.—First dividend, payable Jan. 21, N. Matte, Quebec, curator.

Re A. Fournier & Co.—First and final dividend, payable Jan. 22, C. Desmarteau, Montreal, curator.

Re George Gauvreau.—First and final dividend, payable Jan. 24, C. Desmarteau, Montreal, curator.

Re Moïse Gauvreau.—First and final dividend, payable Jan. 21, C. Desmarteau, Montreal, curator.

Re Laganère & Schambler.—First and final dividend, payable Jan. 23, C. Desmarteau, Montreal, curator.

Re Médéric Lefebvre, Laprairie.—First and final dividend, Kent & Turcotte, Montreal, joint curator.

Re Louis Pigeon.—Collocation on hypothecary claims, C. H. Parent, Montreal, curator.

Re Pouliot & Falardeau, curriers, Quebec.—First dividend, payable Jan. 21, N. Matte, Quebec, curator.

Re J. Rasconi & Co.—First and final dividend, A. A. Taillon, Sorel, curator.

Separation as to property.

Maranda Covey vs. Isaac Patton, farmer, township of Brome, Dec. 27.

Marie Elémire Dubeau vs. Louis Lebel, butcher, Magantic, Dec. 31.

Marguerite Lemonde vs. Théophile Brodeur, hotel-keeper, St. Liboire, Dec. 28.

Agnes Moreau vs. Ephrem Durocher, trader, Iberville, Dec. 30.

GENERAL NOTES.

THE HABIT OF A LIFETIME.—One summer morning, years ago, a number of young lawyers surrounded Col-Boyd, of Norristown, Penn., on the porch of the Stockton House at Cape May. When they were about to leave, the good colonel said he did not feel like parting with them without giving them some good advice. Said he, "Young men, I have practiced law for forty years, and I have found that the best plan to have an easy conscience is to open each week in the proper way. Monday morning I go to my office about half an hour earlier than usual, lock myself in the back room, and go over the events of the preceding week, so as to see that I have wronged no man. If I find that I have, I make amends at once. If I find on mature consideration that I have charged a client too large a fee, I promptly write him a check and reduce it to the proper amount. You cannot too soon adopt such a practice." "Have you often had occasion, Colonel," innocently asked one of the young men, "to make many such repayments?" "That is the singular part of it all," promptly replied the good colonel: "I have religiously followed this habit for forty years, and thus far I have never had occasion to do anything of the kind."

JUDICIAL LIFE.

Judicial honors no sane man will grudge,—

It is an awful bore to be a judge;—

To sit for hours and strict attention keep

When one is dying with desire to sleep.

Lulled by the droning of the voice professional,

Like priest by penitent's outside confessional;

To look as if he never heard these things before,

When counsel every day repeat them o'er and o'er:

To hear them eat their words from term to term

With memories or consciences in firm:

These blowers of both hot and cold empiric

Make patient judges grow a bit satiric;

Never to be allowed to laugh at jokes,

Though counsel are so funny that one chokes:

No use to try to stop the tedious patter

Of immaterial and superfluous matter;

Much better wait until the storm is over

Unless one has the courage of a Grover:

Beware the fate of him, who sawing logs,

His fingers interposes 'twixt the logs;

The saws of lawyers may be out of place,

But meddling with them does not help the case.

—Irving Browne.

The Legal News.

VOL. XIII. JANUARY 18, 1890. No. 3.

The Quebec allotment of the very cheap New Year's gift distributed by the Government, has appeared in the *Gazette*, and numbers 31. Ontario's share was greater than this, but we suppose that "representation by population" is not forgotten in the distribution. Moreover, there are rumours of omissions, and of supplementary lists shortly to appear, which may swell the number to the full half hundred. Meanwhile, Ontario is not satisfied with her half hundred, and so the local attorney general has appointed another half hundred,—ministers local and federal appearing to conspire to do their utmost to convert what should be an honourable ensign into a poor and worthless thing. Politics, of course, is at the bottom of all this. The administrations differ in politics, and so the local officer supplements the lavish distribution among lawyers of one stripe by an equally lavish distribution among his own adherents of another stripe. The result is that her Majesty's counsel, in two provinces scantily populated, number several hundred.

It was noticed in a recent issue, that the gentleman selected for a Superior Court judgeship, was only appointed a Queen's Counsel on the day of his elevation to the bench. There are some other oddities about these appointments. The highest distinction which the bar of Montreal have in their gift is the office of *Edouard*, to which there is an annual election. On three occasions at least, within a few years, the bar have passed over the serried ranks of Queen's Counsel, and have elected a gentleman on whom this title had not been conferred. The material was at hand, but the bar would not use it; the water was there, but the horse would not drink. We refer to the several elections of Messrs. W. W. Robertson, C. A. Geoffron and N. W. Trenholme. Tardily,

very tardily, in these cases, the Q.C. appointment has followed, not preceded, the highest office in the gift of the bar. Then, again, it might be supposed that among such vast numbers of Queen's Counsel, the gentlemen representing the Crown in Her Majesty's Courts would surely be found. But so far, in this province, it has been very much the other way, and during the last few years most of the counsel prosecuting for the Crown, have not been numbered among the Queen's Counsel.

The judges in England appear to observe the Christmas vacation much more religiously than their brethren in this country. A judge was to attend in chambers twice a week, to hear "applications of an urgent character," but there were to be no sittings of the Courts until Jan. 11. The judges do not forget the phrase so popular with school-boys, "*neque semper arcum tendit Apollo*."

Newspaper criticisms of trials, with all deference be it said, sometimes indicate that they are written because the writers must say something, and not that they have something to say which must or ought to be said. An English writer referring to this class of criticism, points out that when the murderer kills his victim, he punishes him without a trial, without a jury, without a judge, and often without any real offence. If our judges, juries, and law Courts are, as some critics aver, all the prisoners in the gaols should be set free, for none of them have apparently had a fair trial. Immediately a trial is concluded in which every means has been used to arrive at the truth, and the accused has had all the aid his counsel could give him—and in contrast to former times the prosecuting counsel usually bespeaks a clement and favourable consideration for the man on trial—as soon as the sentence has been pronounced by the judge, the nation constituting itself a larger jury, without judge or judgment, and without any respect for the finding of the Court, sets to work to retry the case and delivers its verdict. In most cases this verdict from outside is the antithesis of the one found by the Court, which latter must, therefore, be

annulled. It is suggested that, if these agitations for reprieves are allowed to go on, we shall hear the judge, after receiving the verdict of the jury, saying: "Gentlemen of the jury and prisoner at the bar, I propose to postpone passing sentence for a week. In the interval we shall hear the opinion of the nation in regard to what the sentence ought to be, and so we shall be prepared to act in unison with the will of the British public as it affects the interest or the destiny of the prisoner you have been called here to try."

COURT OF QUEEN'S BENCH—MONTREAL.*

Shares subscribed for by mandatory "in trust"
—Necessity of acceptance or ratification by the cestui que trust.

Held:—(Cross and Church, J.J. diss.), That a complete and valid investment in trust cannot be created until the same has been accepted or ratified by the *cestui que trust*, or some one duly authorized in his behalf; and until so accepted, such investment may be revoked by the person who made it. And so, where the father of a minor, who was not her tutor, invested monies belonging to her in shares of a joint stock company, "in trust," and afterwards sold the same, and invested the proceeds otherwise, it was held that no valid trust having been created for want of acceptance in behalf of the minor, her tutor (subsequently appointed) had no right to recover such shares from the purchaser, who had bought them in good faith and paid full value; and in the circumstances, there being no valid trust, the question whether the purchaser had notice of a supposed trust was immaterial.

Sweeney v. Bank of Montreal, 12 Can. S.C.R. 661; (in Privy Council) 10 Leg. News, 250; L. H., 12 App. Cas. 617, distinguished.—*Raphael & Macfarlane*, Tessier, Cross, Baby, Church, Bossé, J.J., (Cross and Church, J.J., diss.), Nov. 27, 1889.

Usufructuary legatee—Administration—Security.

Held:—That a usufructuary legatee who is specially exempted by the will from the obli-

gation of giving security, will not be ordered to do so, on the demand of the *nus propriétaires*, unless his administration, or the change in his financial position, be such as to put the interests of the *nus propriétaires* in jeopardy, which, in the opinion of the majority of the Court, was not the case here.—*Dorion & Dorion*, Dorion, Ch. J., Tessier, Cross, Baby, Bossé, J.J. (Tessier, J., diss.) June 26, 1889.

SUPERIOR COURT—MONTREAL.*

Action qui tam—Enregistrement d'une raison sociale—Suffisance de l'affidavit—Identification de l'action—Conséquences de l'abrogation, par les Statuts Refondus de la Province de Québec, du Statut 48 Victoria, chapitre 20, concernant l'enregistrement des raisons sociales.

Jugé:—1o. Que lorsque, dans une action *qui tam* pour le recouvrement de la pénalité de \$200.00 pour défaut d'enregistrement d'une raison sociale, l'affidavit requis par la loi se trouve au bas du *fiat*, il n'est pas nécessaire que le défendeur soit décrit dans l'affidavit par ses noms et prénoms. Il suffit de référer au "défendeur sus-nommé";

2o. Que l'action est suffisamment identifiée quand l'affidavit se trouve au bas du *fiat* et qu'on y déclare que le défendeur est poursuivi pour n'avoir pas fait enregistrer sa raison sociale.

Dans l'espèce, le demandeur allègue que le défendeur a encouru la pénalité de \$200.00 pour n'avoir pas fait les déclarations exigées par le Statut 48 Victoria, chapitre 29, concernant l'enregistrement des raisons sociales :

Jugé:—3o. Que ce Statut ayant été abrogé, avant les dates mentionnées à la déclaration, par la mise en vigueur des Statuts Refondus de la Province de Québec, le défendeur n'a encouru aucune pénalité, et l'action du demandeur doit être déboutée.—*Barnes v. Cousineau*, Pagnuelo, J., 25 nov. 1889.

COUR DE MAGISTRAT.

MONTREAL, 21 juin 1889.

Coram CHAMPAGNE, J.C.M.

MALLETTE v. TOURANGEAU et al.

Société en nom collectif—Amendement—Nullité absolue.

* To appear in Montreal Law Reports, 5 Q.B.

* To appear in Montreal Law Reports, 5 S. C.

Le demandeur ayant poursuivi la société "Tourangeau & Dumesnil," découvrit que cette société n'existait plus, mais que "Tourangeau & Paquin" lui avait succédé. Il fit alors motion pour substituer dans le bref et la déclaration le nom de Paquin à celui de Dumesnil. Cette motion fut refusée; l'erreur commise étant une nullité absolue, la Cour ne peut y remédier.

Autorités: C. P. C. 49, 51; *Parent v. Picard*, 4 Q. L. R. 73.

Dupuis & Lussier, pour le demandeur.

Marceau & Cie., pour le défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 21 juin 1889.

Coram CHAMPAGNE, J. C. M.

VANIER V. CANADIAN PACIFIC RY. CO.

Voiturier—Responsabilité—Convention spéciale.

- JUGÉ:—1. *Qu'un voiturier peut par convention écrite se soustraire aux responsabilités qui lui incombent en loi, pour le transport d'effets ou marchandises, mais il faut pour cela que cet écrit soit lu et signé par les parties.*
2. *Que si les effets sont livrés en bon état au voiturier, il doit les rendre à destination dans le même état, à moins qu'il puisse établir qu'ils ont été détruits ou endommagés par force majeure.*

Le demandeur a envoyé trois cribles par les chars de la défenderesse de Montréal à Yamaska. Ils furent livrés, à Montréal, à la défenderesse en bon état. A leur arrivée à destination, l'un d'eux était endommagé. La défenderesse ne pouvant expliquer l'accident, chercha à éviter la responsabilité des dommages en plaçant que par les clauses écrites au contrat intervenu entre elle et le demandeur, elle ne s'était rendue responsable que de sa propre négligence.

La Cour, n'admettant pas qu'il y eut dans l'espèce de convention valable limitant la responsabilité de la défenderesse, l'a condamnée à payer les dommages faits au crible.

Jugement pour le demandeur.

Autorités: C. C. art. 1675; *Hart v. Jones*, *Stuart's Reports*, p. 589; *Chartier v. La Cie. du*

Grand Tronc, 17 L. C. J. 26; *de Lorimier*, vol. 13 sur art. 1675.

David, Demers & Gervais, avocats du demandeur.

F. E. Meredith, avocat de la défenderesse.

(J. J. B.)

DECISIONS AT QUEBEC.*

Verdict of Coroner's Jury—Motion to quash.

At an inquisition held by the Coroner on the body of R. L., one of the victims of the Cape Diamond landslide, as to the cause of his death, the jury found by their verdict that one J. K. was taken alive out of the debris on the morning of the 24th of September, and that he died on the evening of the same day; and that his death is due to the gross negligence of the "municipal authorities" of the city of Quebec, in not procuring or furnishing the requisite implements to extricate him; and furthermore, they say that more lives would have been saved had such implements been procured, and had not too much time been lost in extricating the dead.

Held:—That the verdict was a nullity, but that the City of Quebec, a body corporate by statute declaring it to be formed of the inhabitants of the City of Quebec, had no *locus standi* before the Court to move that the verdict be quashed.—*Ex parte City of Quebec*, Q. B., Crown side, Bossé, J., Oct. 21, 1889.

Expropriation—Sentence arbitrale—Jurisdiction des arbitres.

Jugé:—Les arbitres nommés pour estimer la valeur d'un terrain exproprié sous l'acte consolidé des chemins de fer 1880, lequel est décrit dans l'avis donné au propriétaire par la compagnie comme ayant une certaine longueur sur *soixante-deux pieds de large*, n'excèdent pas leur juridiction en accordant une somme dans leur sentence arbitrale pour le dit terrain "*de même que pour trois pieds en dehors des clôtures de chaque côté de la dite ligne perdus pour la culture.*"—*Mathieu & La Cie. du chemin de fer de Q. M. & C.*, en appel, Dorion, J. C., Tessier, Baby, Church, Bossé, J.J., 5 oct. 1888.

* 15 Q. L. R.

Bail à ferme—Privilege du locateur pour avances—Résiliation pour défaut de remboursement d'avances—Arts. 1619, 1623 et 1624 C. C. et Arts. 873, 887 et 888 C. P. C.

Jugé :—1. Le locateur d'un bail à ferme a un privilège pour le remboursement des avances faites au locataire en vertu d'une clause du bail, et peut l'exercer par voie de saisie-gagerie au même titre que celui qu'il a pour le loyer ;

2. Le locateur peut demander la résiliation du bail, pour défaut de remboursement d'avances faites en vertu d'une clause du bail, et ce, par recours à la juridiction sommaire du tribunal, comme pour défaut de paiement du loyer.—*Tessier v. Rousseau*, en révision, Casault, Plamondon, Larue, J.J., 31 oct. 1889.

Dation en paiement—Nantissement—Délivrance—Revendication.

Jugé :—1. La translation réelle de la chose donnée en paiement n'est pas requise pour rendre la dation en paiement obligatoire entre les parties ; mais sans cette translation, la dation en paiement n'opère pas novation, ni extinction entière de la dette qu'elle doit acquitter, et qui ne l'est que par cette translation ;

2. La convention, dans un acte, que le paiement sous un an de la dette et des billets qui la constatent, et qui restent jusque là entre les mains du créancier, équivaudra à réméré des meubles qui y sont énumérés et qui y sont dits donnés en paiement, mais qui sont laissés en la possession du débiteur qui s'oblige de les tenir assurés, jointe aux paiements à compte de sa dette acceptés par le créancier, avant et après l'expiration de l'année, n'est pas, malgré les termes employés, une dation en paiement, mais une promesse de nantissement qui ne fait pas le créancier propriétaire et qui ne lui permet pas de revendiquer ces meubles.—*Dignard v. Robitaille*, C. S., Casault, J., 22 mai 1889.

Procédure—Jurisdiction—Action contre un absent.

Jugé :—Lorsque la juridiction du tribunal dépend de la possession de biens par un

absent dans un district où il est assigné, ce fait doit être allégué dans la déclaration et établi par la preuve.—*Soucy v. Lizotte*, en révision, Casault, Andrews, Larue, J.J., 13 oct. 1889.

RECENT ENGLISH DECISIONS.

Shipping.—The loss of a cargo of wheat shipped on board a vessel and damaged in transit, owing to the fact that a portion of the hold was tainted with paraffin, held to be damage by improper stowage and not 'improper navigation' within the rules of association (*Canada Shipping Company v. British Shipowners' Mutual Protection Association*, 58 Law J. Rep. Q. B. 462).

Inconsistent pleading.—Where the defendant in an action for libel, after admitting publication, pleaded that, except as afterwards admitted, the words used by him were fair comment on a matter of public interest, and, to the extent of the facts to be stated afterwards, were true in substance and in fact, and proceeded to justify the various statements in the alleged libel, but admitted that he had used words of the plaintiff, being the words complained of, which were not wholly justified by the facts, and could not be considered in every respect fair comment, and he paid the sum of forty shillings into Court, and said the same was sufficient to satisfy the plaintiff's claim : held that, as the defendant had pleaded justification to the whole of the libel, and had paid money into Court in respect of a portion, such a plea was both embarrassing and contrary to the provisions of order XXII., rule 1, and ought to be struck out (*Fleming v. Dollar*, 58 Law J. Rep. Q. B. 548).

Combination between shipowners.—A combination between shipowners carrying from the same ports, with the object of keeping freights within their control, effected by allowing a rebate to shippers who ship exclusively on board their ships, by prohibiting their agents, on penalty of removal, from being directly or indirectly interested in ships other than theirs, and by sending to ports, where other shipowners are asking for cargo, ships sufficient to lower the freights below the rate under open competition, thereby causing loss to such shipowners, not

being attended by circumstances of dishonesty, intimidation, molestation, or actual malice, is not actionable as a wrong by individuals, as a conspiracy, or as in restraint of trade (*Mogul Steamship Company (Lim.) v. M' Gregor, Gow & Co.*, 58 Law J. Rep. Q. B. 465)—(dissentiente Esher, M.R.).

Bills of Exchange.—If in an action on a bill of exchange, fraud or illegality is proved in the issue or negotiation of a bill, the holder must prove that value has been given, and that it has been given without suspicion of the fraud (*Tatham v. Hasler*, 58 Law J. Rep. Q. B. 432).

Libel.—Where the plaintiff moved for a new trial, and not for judgment on the pleadings in an action for libel, based on a pamphlet purporting to be the judgment of a judge, and intimated an opinion contrary to that of the Courts below: held that if a judgment is published which does not give a complete and substantially accurate account of the matter adjudicated upon, and the publication of it is unaccompanied by a report of the evidence, it is not privileged (*MacDougall v. Knight*, 58 Law J. Rep. Q. B. 537).

A WORKMAN'S TOOLS PERSONAL LUGGAGE.

At the Brentford County Court, on Friday, October 18, before His Honor Judge Stonor, the case of *White v. The London and South-Western Railway Co.* was heard. The plaintiff, a carpenter, sued the defendants for 15*l.*, the value of a box of tools which he had delivered to a porter at Basingstoke, stating at the same time the nature of its contents. The porter labelled the box, and put it into the luggage van of the train by which the plaintiff travelled thence to Hounslow, but on the arrival of the train at Hounslow the box was not forthcoming. The defendants resisted the claim on the ground that a workman's tools were not 'personal luggage.' His Honor cited the case of *Macrow v. The Great Western Railway Co.*, 40 Law J. Rep. Q. B. 300; L. R. 6 Q. B. Div. 622, where Lord Chief Justice Cockburn, in delivering the judgment of the Court of Queen's Bench, said: "We hold the true rule to be that, whatever the passenger takes with him for his personal

use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include not only all articles of apparel, whether for use or ornament, leaving the carrier herein to the protection of the Carriers Act (to which being held to be liable in respect of passengers' luggage as a carrier of goods he undoubtedly becomes entitled), but also the gun-case or the fishing apparatus of the sportsman, the easel of an artist on a sketching tour, or the books of the student and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying;" and his Honor held that the tools of a workman were as much 'personal luggage' as the easel of an artist or the books of a student, and the taking of which certainly arises from the fact of his journey to or from his work, which was its ultimate purpose, and that he was therefore entitled to recover. His Honor was pressed by counsel for the defendants with the case of *Phelps v. The London and North-Western Railway Co.*, 34 Law J. Rep. C. P. 249, where it was held that deeds of a client carried by an attorney to the assizes were not 'personal luggage'; but his Honor held that the present case was distinguishable from that case on the ground that the deeds in question in the latter were not the property of the attorney, and that they probably fell within the Carriers Act. His Honor also held that if the box of tools now in question were not 'personal luggage,' yet, as the porter took charge of it, and labelled and put it into the van, the defendants were liable, according to the case of *Cubitt v. The London and North-Western Railway Co.*, 31 Law J. Rep. C. P. 271, and entered a verdict for the plaintiff, with costs.—Judgment accordingly.

THE INCORPORATED LAW SOCIETY AND COMMISSIONERS FOR OATHS.

The following statement, prepared by the council of the Incorporated Law Society, as to what they consider to be the duties of

commissioners to administer oaths, has been published :—

Numerous and urgent communications have been received by the council of the Incorporated Law Society from commissioners in London and various parts of the country, in which an expression of opinion from the council is asked as to what are the precise duties of commissioners to administer oaths on taking affidavits.

It has been represented by the commissioners that they find themselves in considerable difficulty by reason of the reported *obiter dictum* of one of the judges of the Supreme Court in a recent case, in which his lordship, after observing that the affidavits before him were not read over in the commissioner's presence, and that he took no means to ascertain whether he knew to what the deponents were swearing, said it was the duty of a commissioner, before he administers an oath, to satisfy himself that the witness thoroughly understands to what he is going to swear, and that the commissioner should not be satisfied by anyone but the witness himself. This expression of opinion on the part of the learned judge has taken the profession very much by surprise.

In the view of the council (subject to the exception contained in a Rule of Court which will be referred to presently), all that a commissioner is required to do is to see that the deponent is apparently competent to depose to the affidavit, and that he knows he is about to be sworn by the commissioner as to the truth of the statements it contains, and that the exhibits (if any) are the documents referred to.

The council think that the entire responsibility for the contents of the affidavit rests with the deponent and the solicitor who prepares it.

It is obvious that it would be impossible for the commissioner to determine whether the deponent understood every statement made in the affidavit, unless he himself had read it to the deponent, and had himself mastered the facts of the case.

Such a course would, in the opinion of the council, be impracticable, and beyond what they consider to be the duties of the commissioner.

In all cases in which oaths are administered by officials of the Court, and official persons other than solicitors holding commissions, no such course as that now suggested has ever been adopted. It may be stated in general terms that what is required of the person administering the oath is to ascertain that the deponent is actually in his presence, by inquiring whether the signature to the affidavit before him is the name of the deponent, and is in his own handwriting; and, if the answers are in the affirmative, the oath is administered in the following form (Braithwaite's Oaths in the Supreme Court of Judicature, 4th edition, 1881, p. 58, No. 5) : "You do swear that the contents of this your affidavit, are true. So help you God."

The only exception of which the council are aware to this form of taking the oath is that provided by Order XXXVIII, rule 13, of the Rules of the Supreme Court, 1883, which applies solely to the case of blind or illiterate deponents. It appears to the council that if it were necessary, as explained by the learned judge, to see in every case that the deponent understood the contents of his affidavit, there would be no necessity whatever for the rule in question.

The persons authorized to administer oaths to be used in the Supreme Court are those who have received commissions since the passing of the Judicature Act, 1873, and such persons as were previously to that date entitled to administer oaths. Before the year 1853, oaths in London were administered by the judges and by certain officials of the Court and other official persons, and in the country by masters extraordinary in Chancery; and after 1853 also by London commissioners, who were then appointed, and the form in which the oath was taken was the same as that which now obtains.

PRODUCTION OF CONFIDENTIAL DOCUMENTS NOT PRIVILEGED.

At the Brentford County Court, before his Honor Judge Stonor, on December 9, judgment was given in the case of *Barday v. The Atlas Brick Company*. His Honor said: This is an appeal from an order made by the registrar, in an action under the Employers'

Liability Act, for the production of a document which is admitted by the affidavit of the defendants' manager to be in their possession or power, but which they claim substantially to be privileged as being correspondence between themselves and their 'agents,' with reference to, and in view of, threatened proceedings of the plaintiff against them. The document in question is dated September 5, and was produced for the information of the Court. It is a printed form, and is headed as follows: 'Private and confidential. Answering these questions does not imply that the injured person is making or will make a claim. Employers' Liability Assurance Corporation (Limited). Preliminary particulars of the accident to be furnished by the agent of the corporation or by the employer.' Then follows a series of questions tabularly arranged as to 'the employer,' 'the person injured,' and 'the accident' in question, to which answers have been given in writing. The document was not signed, but was admitted to have been furnished to the assurance corporation by the defendant company or by their authority from information supplied by them. There is, of course, no doubt that the plaintiff is entitled to the production of this document if it be not privileged; but the defendant company contend that it is privileged because the assurance corporation to whom it has been furnished were their 'agents,' and it was so furnished to them in contemplation of litigation. I think that this contention is erroneous, and that the registrar's order was quite right. The only relation which appears to have existed between the defendant and the assurance corporation arose from a policy of assurance, which is not produced, but which common knowledge tells us was in the nature of an indemnity given by the latter to the former against pecuniary liability in respect of accidents to the workmen in their employment. Probably the defendant company was bound by this contract to furnish to the assurance corporation early intelligence of the particulars of any accident in respect of which they might claim to be indemnified. At all events it was proper for them to do so; and, accordingly, within a week of the accident in question, they fur-

nished to the corporation the information contained in this document. Besides the contract of indemnity contained in the policy of assurance, there is no evidence of any relation between the defendant company and the assurance corporation whatsoever, and consequently no evidence of any agency, and, least of all, of that legal professional agency, or rather relation, which, for the present purpose, is the only ground of privilege recognized by either the Courts of law or equity since the Judicature Act, 1873 (see the case of *Anderson v. The British Bank of Columbia*, and particularly the judgment of the Master of the Rolls, Sir George Jessel, 45 Law J. Rep. Chanc. 449; L. R. 2 Chanc. Div. 644). This appeal will therefore be dismissed, with costs; and, according to the undertaking of counsel, the document in question will be produced forthwith, as the trial is to come on next Friday at Brentford.

LORD MORRIS.

The Right Hon. Sir Michael Morris, who has been appointed Lord of Appeal in Ordinary in place of Lord Fitzgerald, deceased, and is, by virtue of his office, entitled during his life to rank as a baron, under the style of Lord Morris, of Spiddal, county Galway, is the eldest son of the late Mr. Martin Morris, J.P., of Spiddal, and was born in November, 1827. He was educated at Erasmus Smith's School, Galway, and at Trinity College, Dublin, where he graduated B.A., and was was senior moderator and gold medallist in 1847. He was called to the Irish bar at the King's Inns, Dublin, in 1849, and obtained a silk gown in 1863. He was high sheriff of Galway in 1850, and recorder of Galway from 1857 to 1865, Solicitor-General for Ireland from July to October in 1866, and Attorney-General from that date to March, 1867. From 1865 to 1867 he represented the county of Galway in Parliament, and introduced the Attorneys and Solicitors Act, 1866, Ireland, assimilating the law regulating them to the English law. He vacated his seat in the House of Commons on being appointed Justice of the Common Pleas in Ireland, and was promoted to the chief justiceship of the the Queen's Bench in 1887. He is a magis-

trate for the counties of Cavan and Galway. He is also a Commissioner of National Education in Ireland, and a senator of the Royal University of Ireland. Lord Morris married, in 1860, Anna, daughter of the late Hon. Henry George Hughes, a Baron of the Exchequer in Ireland, by whom he has a family. Lord Morris is the sixth lord of appeal who has been created, the previous creations being those of Blackburn, Gordon, Watson, Fitzgerald and Macnaghten.—*Law Journal* (London).

QUEEN'S COUNSEL.

The following appointments appear in the *Canada Gazette*, Jan. 11 :—

Quebec:—George MacKenzie Clark, Montreal. Lawrence G. Macdonald, St. John's. John Dunlop, Montreal. Tancrede de Chamilly de Lorimier, Montreal. François-Xavier Mathieu, Terrebonne. Athanase Branchaud, Montreal. J. Norbert Pouliot, Rimouski. Amédée L. Wilfred Grenier, Montreal. Joseph O. Joseph, Montreal. Norman W. Trenholme, Montreal. Christopher Benfield Carter, Montreal. Frédéric L. Béique, Montreal. P. J. Coyle, Montreal. Henry C. Saint-Pierre, Montreal. Pierre Narcisse Martel, Three-Rivers. H. Adjutor Turcotte, Quebec. Horace Archambault, Montreal. Louis Napoléon Asselin, Rimouski. Albert Bender, Montmagny. Michael T. Hackett, Stanstead. Duncan McCormick, Montreal. A. O. T. Beauchemin, St. Hyacinthe. Panet Angers, Quebec. James N. Greenshields, Montreal. Gustavus G. Stuart, Quebec. Siméon Beaudin, Montreal. Joseph Edouard Faribault, L'Assomption. Michael J. F. Quinn, Montreal. William Bruno Nantel, Terrebonne. Robert D. McGibbon, Montreal. Léandre J. Ethier, Montreal.

North-West Territories:—William White, Moosomin.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Jan. 11.

Judicial Abandonments.

Hyman Bercovitch, clothier, Montreal, Jan. 7.
Frank Bercovitz, cap manufacturer, Montreal, Dec. 31.
Théophile Joseph Bourdon, grocer, St. Henri, Dec. 30.

Napoléon Bourgeois, of firm of N. Bourgeois & Co., Montreal, Jan. 3.

Céline Hébert, boot and shoe dealer, doing business under the name of J. B. L. Rolland, Montreal, Jan. 3.
Gagnon Frère & Co., Quebec, Jan. 2.

Murdock Alex. Graham, doing business as Graham & Co., Montreal, Dec. 27.

John Henry Hodges, dry goods merchant, Montreal, Jan. 4.

N. A. Mansfield, district of Bedford, Dec. 27.

Joseph Ovila Massicotte, grocer, Montreal, Jan. 7.

Robert Neill, district of Bedford, Dec. 10.

William Stanley, bookseller, Quebec, Jan. 7.

Michel Tessier, boot and shoe dealer, Quebec, Jan. 7.

Curators Appointed.

Re J. B. Allard.—C. Desmarteau, Montreal, curator, Dec. 27.

Re Joseph Beaudoin.—C. Desmarteau, Montreal, curator, Jan. 3.

Re F. Bercovitz.—John Fulton, Montreal, curator, Jan. 9.

Re L. N. Boisclair.—J. Beaudry, Three Rivers, curator, Dec. 30.

Re Didace Bolvin, contractor.—A. M. Archambault, parish of St. Antoine, curator, Dec. 30.

Re J. Emile Caron, dry goods, Quebec.—H. A. Bedard, Quebec, curator, Jan. 8.

Re Onésime Cartier, jr.—Bilodeau & Renaud, Montreal, joint curator, Jan. 8.

Re Murdoch Alexander Graham (Graham & Co.), Montreal.—Dawson Kerr, Montreal, curator, Jan. 4.

Re Nelson A. Mansfield.—J. Mackinnon, Cowansville, curator, Dec. 31.

Re Napoleon McReady, St. Romuald.—H. A. Bedard, Quebec, curator, Jan. 8.

Re James Millar.—Millier & Griffith, Sherbrooke, joint curator, Jan. 8.

Dividends.

Re Z. S. Aubut, Montreal.—First and final dividend, payable Jan. 29, W. A. Caldwell, Montreal, curator.

Re P. G. Brassard, Three Rivers.—Dividend, payable Jan. 31, Kent & Turcotte, Montreal, joint curator.

Re Olivier Demers, St. Simon.—First and final dividend, payable Jan. 27, J. O. Dion, St. Hyacinthe, curator.

Re Théophile Désy, St. Tite.—First and final dividend, payable Jan. 27, H. A. Bedard, Quebec, curator.

Re Guenette & Co., St. Dominique.—First and final dividend, payable Jan. 27, J. O. Dion, St. Hyacinthe, curator.

Re J. A. Josephson, Montreal.—Dividend, payable Jan. 31, Kent & Turcotte, Montreal, joint curator.

Re N. Lemire, St. Zéphirin.—Dividend, payable Jan. 31, Kent & Turcotte, Montreal, joint curator.

Re L. Vigant, St. John's.—Dividend, payable Jan. 31, Kent & Turcotte, Montreal, joint curator.

GENERAL NOTES.

KENT'S COMMENTARIES.—The copyright of Kent's Commentaries has expired. The *Law Librarian*, an American quarterly journal, observes that the work is now legitimate plunder for the pirates. A new edition is announced by Little, Brown & Co., at a reduction of eight dollars in price. In the last edition, reference is made to 5,000 additional cases. The Americans say that cases must be cited for every proposition. English practitioners are inclined to avoid citing cases. The overgrowth of cases is one of the most deplorable incidents of modern jurisprudence.—*Law Times* (London).

The Legal News.

VOL. XIII. JANUARY 25, 1890. No. 4.

In a work recently published in the United States, entitled "Leading Cases on Real Property," the editors refer to twenty-four thousand cases. If the cases on one branch of the law have assumed such enormous proportions, it is not to be wondered at that the lawyers of that country sigh for some alleviation of the burden, or that those who look to codification as the panacea should be eager for a code.

The complaint of profuseness in conferring the distinction of Q.C. is not a new one. The evil seems to have commenced twenty-three years ago, when a great number of appointments were made, twenty-four being in this province. At that time some of the older members of the profession seriously contemplated throwing up the appointment. We find, on looking back, that we referred to this incident in another place (3 L.C. Law Journal, p. 1) as follows:—"The creation in one day of two dozen Queen's Counsel, in the province of Quebec alone, has naturally excited much criticism. Some received the announcement with violent indignation, others with contemptuous indifference; but no one, as far as we have observed, has had a word to say in justification or apology. The precise amount of honour attaching to the letters "Q.C." was previously somewhat vague and uncertain. We knew that the title was frequently conferred as a reward for electioneering services; that it was not uncommonly bestowed on partisans of slight professional repute, while it was withheld from men of sterling worth who meddled not in 'the muddy pool of politics'; but it was still held in some estimation, and the silk gown was not without dignity. Now, however, all ambiguity on the subject has been removed. That which in England is the victor's palm, the prize of a good fight, the reward of a successful career, has here been conferred, in some instances upon gentlemen who have long ceased to practice their profession, and in others upon political

adherents of dubious antecedents. The rank of Q.C. has fallen to somewhat the same level as that of J.P., or some of the other titles which have been lavishly bestowed, and if there were not another appointment for the next twenty years, the prostrate dignity would hardly recover from the shock." It is matter of history that the subsequent career of some of the two dozen referred to was not particularly brilliant, either morally or intellectually. We hope that the present appointments may be more fortunate.

They do not appear to be well pleased in Ontario at the recent deluge of appointments. The *Canada Law Journal* says "the list has caused surprise to the public and laughter among the profession.... The appointment is now known either as an easy way of paying a compliment to a lawyer for whom there is no substantial *solatium* at the time available; or as an inexpensive mode of pleasing one who is a political supporter by the appointment of some local ally of his in the legal fraternity." The *Canadian Law Times*, whose editor is among the newly-appointed (and the appointment is, we are confident, well-merited), says: "No one can look at the lists of appointments made by the Dominion Government in Ontario without being struck by the fact that the selection, in very many cases, has been due to political friendship, rather than distinction at the bar; and the same remark applies with equal force to the appointments made by the Provincial Government. The cause is unquestionably political rivalry. If one party is unduly favored in making the appointments, the other naturally answers the challenge by heaping the honours on its own adherents—a sprinkling of the opposite party being in each case included in the favours, to show the fairness of the selection."

The immunity of the bar during the epidemic of small pox was matter of remark. The members of the profession have not been so fortunate in resisting the influenza. Exemption from its assaults has been the exception rather than the rule, and several leading counsel as well as judges have been seriously ill.

COURT OF QUEEN'S BENCH—MONTREAL.*

Incorporated City—C.S.C. ch. 85, s. 3—Damages resulting from neglect to maintain road—Limitation of three months need not be pleaded.

Held:—1. Section 3 of C.S.C., ch. 85, (R.S.Q. 4616, § 3) applies to the City of Sherbrooke; and no action of damages thereunder can be maintained unless brought within three months after the same have been sustained.

2. The Court is obliged to apply the prescription though not pleaded by the defendant.—*Corporation of the City of Sherbrooke & Dufort*, Dorion, Ch. J., Tessier, Cross, Church, Bossé, JJ. (Tessier, J. diss.), Nov. 20, 1889.

Fraud—Sale of insolvent estate by assignee—Collusion between persons who had tendered—Remedy of creditors—Distribution of amount recovered as damages.

Held:—1. Where a person who had tendered for the purchase of an insolvent estate, and who had put in two bids, and acting in collusion with the insolvent, bought off a higher bidder in order that his own lowest tender might be accepted; that this artifice was a fraud upon the creditors of the estate, and they, or any one of them, might recover from such bidder the amount of damage caused thereby to the estate.

2. That two or more independent firms, creditors of the insolvent, may unite in such action, and claim one money condemnation.

3. But the amount recovered in such action is an asset of the estate, and must be distributed as such, and cannot be wholly paid to the creditors who instituted the suit.—*Jacobs & Ransom*, Dorion, ch. J., Tessier, Cross, Church, Bossé, JJ., Feb. 26, 1889.

SUPERIOR COURT—MONTREAL.*

Declinatory Exception—Completion of cause of action in contract for sale—Contract by telegram and delivery.

Held:—That where a merchant domiciled at S., asks by telegram from a merchant

domiciled at M., for a quotation of certain goods to be delivered at S., to which the merchant at M. telegraphs in reply offering certain quantities at certain prices, and the merchant at S. thereupon responds accepting the prices but changing the quantities, upon which the merchant at M. ships in accordance with the last telegram, no complete right of action arises in the District of M., and an action brought in such District is dismissed.—*McFee v. Gendron*, Pagnuelo, J., Oct. 9, 1889.

Certiorari—Judgment of inferior jurisdiction—Arts. 1220, 1221, C.C.P.—Mens rea.

Held:—Where a magistrate dismissed a charge of selling intoxicating liquor to minors, on the ground that the complainant had not proved that the defendant knew the persons to be minors; that this was not a case for the issue of a writ of certiorari under § 1 or 3 of Art. 1221, C.C.P., there being neither want or excess of jurisdiction, nor any gross irregularity in the proceedings.—*Ex parte Hamilton*, Tait, J., Feb. 27, 1889.

CIRCUIT COURT.

MONTREAL, Sept. 30, 1889.

Coram PAGNUELO, J.

BOILEAU v. LA CORPORATION DE LA PAROISSE DE STE. GENEVIEVE.

Municipal law—Revision of valuation roll—Farmers' sons—Appeal to Circuit Court—Petition.

HELD:—1. *Inasmuch as, under R. S. Q. 177, as amended by 52 Vict. (Q.), ch. 4, the list of parliamentary electors must be prepared each year "according to the valuation roll then in force in the municipality," every parliamentary elector has an interest to ask that the names of persons who are electors be added to the valuation roll; and such demand may be made, not merely when the triennial roll is prepared, but also in each of the other two years when the roll is revised and corrected.*

2. *The Act 52 Vict. (Q.), ch. 4, having extended the right of suffrage to farmers' sons, and sons of owners of real property, the*

* To appear in Montreal Law Reports, 5 Q.B.

* To appear in Montreal Law Reports, 5 S.C.

petitioner was entitled to ask that the names of such persons be placed on the valuation roll from which the list of electors is prepared.

3. *Under R. S. Q. 6218, amending Art. 1061, M.C., an appeal lies to the Circuit Court from the rejection by a local municipal council of the petition of an elector, that names of persons entitled to vote be placed on the valuation roll.*

4. *In the present case the petition was, in fact, made in writing, a list of names, signed by the petitioner, having been produced by him before the Council.*

Semble, that an appeal lies under Art. 1061, M.C., in the case of the revision of the triennial roll under Art. 735 M.C., whenever the demand has been made in a sufficiently definite form to leave no doubt as to the names of the persons sought to be placed on the list, and there exists some indication thereof in writing.

PAGNUMBO, J. :—

Il s'agit d'un appel, sous l'acte municipal, contre le refus du conseil municipal de la paroisse de Ste.-Geneviève, d'entendre la demande faite par l'appelant, le 26 juillet dernier, d'inscrire certains noms de fils de cultivateurs et de propriétaires sur le rôle d'évaluation. La requête conclut à ce qu'ordre soit donné à la corporation intimée, et à ses officiers, d'inscrire sur le rôle d'évaluation les noms des dits fils de propriétaires et de cultivateurs. La corporation a plaidé en droit :

1o. Que le requérant n'a aucun intérêt à faire entrer au rôle d'évaluation les noms des dits fils de cultivateurs et de propriétaires ; attendu que, par l'art. 746 A, C.M., le rôle est corrigé chaque année pour les fins locales seulement, et que les dits fils de cultivateurs et de propriétaires ne peuvent être taxés et ne peuvent voter aux élections municipales.

La réponse est que les listes électorales parlementaires doivent être faites d'après le rôle d'évaluation, suivant l'article 177 des Statuts Refondus de Québec, tel qu'amendé par le statut de 1889, 52 Vict., ch. 4.

Par la section 4, le secrétaire-trésorier de chaque municipalité doit préparer la liste

alphabétique des électeurs parlementaires, chaque année, du premier au quinze du mois de mars. Cette liste doit comprendre les noms de toutes les personnes qui doivent être portées au rôle d'évaluation alors en force dans la municipalité, paraissant être électeurs, soit comme propriétaires ou occupants, ou en vertu de l'article 173 tel qu'amendé par la section 3^e du même statut, c'est-à-dire, entr'autres les instituteurs, fils de cultivateurs ou de propriétaires. Tout électeur est intéressé à faire ajouter au rôle d'évaluation les noms des personnes qui sont électeurs, d'après la loi en force ; aussi, après discussion, ce moyen a été abandonné par l'intimée. D'ailleurs les mots "pour les fins locales seulement" ont été retranchés par le Statut 52 Vict., ch. 54, sect. 15, qui amende un grand nombre d'articles du Code Municipal. Je pourrais ajouter que ces mots faisaient opposition aux "fins de comté," pour les taxes que le conseil de comté peut imposer sur les différentes paroisses du comté.

2o. La corporation plaide qu'il n'est pas allégué que la plainte ait été faite par écrit. J'ai réservé ce moyen pour être examiné avec le mérite de l'appel.

3o. La corporation prétend que les noms des fils de cultivateurs et de propriétaires ne doivent être entrés que sur le rôle triennal, et que le conseil municipal n'a pas le droit d'ajouter ces noms, lorsque le rôle est seulement corrigé, chacune des deux autres années ; c'est pour cette raison que le conseil municipal a refusé d'entendre la demande de l'appelant. Cette raison me paraît mal fondée. La loi de 1889, 52 Vict., chap. 4, étend le droit de suffrage aux fils de cultivateurs et de propriétaires (sec. 3, amendant l'article 173 des statuts refondus de Québec). La section 4 amendant l'article 177 des statuts refondus de Québec, oblige le secrétaire-trésorier de la municipalité à faire, chaque année, une liste alphabétique de toutes les personnes qui, d'après le rôle d'évaluation, ont droit d'être électeurs, soit comme occupants ou propriétaires, ou en vertu de l'article 173 amendé. L'article 7 amende l'article 718 du code municipal, et déclare que le rôle d'évaluation doit comprendre les noms des fils de cultivateurs et de propriétaires avec plusieurs autres qui sont énumérés.

Ce serait contredire l'intention du législateur que de ne pas inclure sur les listes électorales les noms de toutes les personnes à qui la législature a accordé le droit de vote.

Puisque les personnes seules dont les noms sont sur les listes électorales peuvent voter, et que la liste électorale est faite chaque année d'après le rôle d'évaluation, il est évident que ces personnes ont le droit d'être mises sur le rôle d'évaluation chaque année.

Reste la question de savoir s'il y a appel seulement lorsqu'une plainte a été faite par écrit.

L'appel est accordé par l'article 1061 du Code Municipal, tel qu'amendé par les Statuts Refondus de Québec, article 6218 :

"50. De tout refus ou négligence par un conseil local, de prendre en considération une plainte écrite produite en vertu de l'article 735, ou pour obtenir la révision ou l'amendement du rôle d'évaluation en conformité des articles 746 et 746A."

L'intimée prétend que ce paragraphe n'accorde l'appel que lorsqu'il a été produit une plainte écrite, en vertu de l'article 735 ou (*une plainte écrite*) pour obtenir la révision et l'amendement du rôle d'évaluation en conformité des articles 746 et 746A.

L'appelant, au contraire, prétend qu'il y a appel, lorsque le conseil a refusé de prendre en considération une plainte écrite produite en vertu de l'article 735, et (*aussi, qu'il y a appel*) pour obtenir la révision et l'amendement du rôle d'évaluation, en conformité des articles 746 et 746A.

Pour résoudre la difficulté qui provient de l'ambiguïté de la phraséologie il convient de dire que l'article 735 C.M. se rapporte à l'examen du rôle d'évaluation qui se fait tous les trois ans, et les articles 746 et 746A concernent la correction annuelle du rôle d'évaluation. L'article 735 porte que la demande de révision du rôle triennal doit être faite par écrit le ou avant le jour fixé pour l'examen du rôle, ou en articulant verbalement la plainte devant le conseil, lors de cet examen.

Article 736. Le conseil donne un avis du jour où il procédera à l'examen.

Article 737. Le conseil doit prendre connaissance des plaintes écrites ou articulées

verbalement devant lui et entendre toutes les parties intéressées et leurs témoins.

L'article 746 qui se rapporte à la révision annuelle du rôle, porte que le conseil doit d'abord entrer les noms des nouveaux propriétaires ou occupants qui ont remplacé ceux qui étaient portés précédemment sur le rôle. L'article 746A porte que le conseil local doit, chaque année qu'il n'est pas fait un nouveau rôle d'évaluation, réviser et amender le rôle d'évaluation en vigueur, et en se conformant aux formalités prescrites par les articles 736, 737 et 738.

Or l'article 737 parle de plaintes écrites ou verbales; l'article 738 se rapporte au mode de faire les changements sur le rôle. L'article 746A ajoute que les amendements ainsi faits au rôle d'évaluation, entrent immédiatement en vigueur, sujets néanmoins à l'appel à la Cour de Circuit.

Il y a donc appel à la Cour de Circuit de tous les amendements faits au rôle d'évaluation en vertu des articles 746 et 746A. Or ces amendements peuvent se faire sur demande écrite ou verbale; dans les deux cas il y a appel à la Cour de Circuit.

Il me semble donc que l'appel existe, même si la demande n'avait pas été faite par écrit, lorsqu'il s'agit de la révision annuelle du rôle d'évaluation. L'article 1061 du Code municipal est complété et expliqué par la fin de l'article 746A.

Je me demande pourquoi l'appel est accordé lorsqu'une plainte écrite est faite en vertu de l'article 735 pour le rôle triennal, et pourquoi il serait refusé lorsque la plainte est faite verbalement, lorsque ces deux modes sont admis par la loi. Je ne vois pas d'autre raison que l'incertitude qui pourrait exister sur une demande verbale.

J'en conclus que chaque fois que la demande est faite d'une manière assez précise pour qu'il n'y ait point de doute sur les noms des personnes que l'on a voulu faire inscrire ou rayer, l'appel doit exister, pourvu qu'il en reste quelque trace par écrit. Suivant moi, l'intention de la loi serait accomplie et les fins de la justice obtenues, si le procès-verbal de la séance, par exemple, contenait mention de la demande faite et les noms que l'on a voulu faire ajouter ou retrancher. J'en dirais encore autant de tout écrit sur lequel

ces noms auraient été mis et lus à la séance.

Mais il n'est pas nécessaire pour moi de dire en quelle forme la demande par écrit doit être faite pour qu'il y ait appel dans le cas de l'article 735, puisqu'il ne s'agit pas ici du rôle triennal, mais de la révision annuelle du rôle en vertu de l'article 746A. Je suis d'avis qu'en vertu de ce dernier article il y a appel, que la demande soit par écrit ou qu'elle soit verbale, et non seulement si le rôle a été amendé, mais aussi si l'on a refusé de l'amender d'après les articles 1061 et 764A combinés.

De fait, l'appelant qui est notaire, avait à la main un papier qu'il a lu au Conseil et qui contenait les noms qu'il voulait faire ajouter à la liste. Il a produit devant moi une requête en forme, sur un blanc imprimé, contenant les noms qu'il voulait faire insérer, avec leurs qualités, les noms de leurs pères, la désignation des immeubles appartenant à ceux-ci, la valeur réelle et la valeur annuelle de ces immeubles. Ce document est signé par l'appelant. L'un des témoins dit qu'il a vu ce document avant la séance du Conseil dans les mains de l'appelant et aussi lorsqu'il a fait sa demande au Conseil. Plusieurs autres témoins ont déclaré que l'appelant avait un document en main qu'il a lu au Conseil.

Je suis porté à croire que de fait l'appelant avait ce document dans la main; s'il n'a pas été laissé entre les mains du secrétaire, c'est que le Conseil a refusé d'en prendre connaissance en disant que les noms des nouveaux électeurs ne pouvaient être mis sur le rôle que lorsqu'il serait fait un nouveau rôle triennal.

Pour ces raisons je maintiens que l'appel est bien porté, et j'ordonne l'insertion au rôle des noms de Joseph et Pierre Payment, fils majeurs de Toussaint Payment, propriétaire, demeurant avec lui, etc., etc.

Il a été mentionné que sur un appel à la Cour de Circuit il ne doit pas être entendu de nouveaux témoins, à moins, dit l'article 1071, que l'appel ne soit d'une décision du Conseil de comté ou d'un bureau de délégués siégeant en première instance.

Cet article n'est pas applicable à l'espèce: il a été fait lorsque le droit d'appel n'existait que des jugements rendus par les juges de paix sur des poursuites intentées en vertu du

Code municipal, et des décisions données par un Conseil de comté relativement à un procès-verbal ou à un acte de répartition, lorsque le Conseil siégeait autrement qu'en appel. (Voir le Code Municipal de 1872, art. 1061).

L'appel a été depuis accordé dans des cas où il serait nugatoire à moins qu'on ne permette la preuve des griefs dont on se plaint.

En accordant le droit d'appel contre le refus du Conseil de prendre connaissance d'une plainte, la Cour ne peut corriger l'erreur et l'injustice du Conseil municipal qu'en admettant la preuve que les noms dont on demande l'insertion ou le rejet ont droit ou non d'être sur la liste électorale et le rôle d'évaluation; il faut donc que la Cour de Circuit puisse faire la preuve qui aurait été faite devant le Conseil, si celui-ci avait voulu entendre la plainte.

Voici le jugement :

" La Cour ayant entendu les parties par leurs procureurs, tant sur la *réponse en droit* qu'au mérite du présent appel, examiné la procédure, etc ;

" Considérant que l'appelant avait un intérêt suffisant, comme électeur et contribuable, de demander l'insertion au rôle d'évaluation des personnes qui, d'après la loi, sont dûment qualifiées à être électeurs parlementaires ;

" Considérant qu'à la séance du Conseil municipal de la paroisse de Sainte-Geneviève tenue le 26 juillet dernier (1889) dans le but de réviser et amender le rôle d'évaluation de la dite paroisse, conformément aux articles 746 et 746A du Code Municipal, l'appelant a demandé que les noms de Joseph et Pierre Payment, fils majeurs de Toussaint Payment, celui de Ovila Legault, fils majeur de Aldéric Legault, celui d'Emery Cardinal, fils majeur d'Etienne Cardinal, ceux de Camille, Albert et Etienne Brunet, fils majeurs de François-Xavier Brunet, demeurant tous avec leurs pères, les dits Toussaint Payment, Aldéric Legault, Etienne Cardinal et François-Xavier Brunet, étant cultivateurs et propriétaires d'immeubles portés au rôle d'évaluation pour un montant suffisant pour qualifier leurs dits enfants ; et que le Conseil municipal a alors refusé d'entendre la dite demande ;

" Considérant que l'appelant était bien fondé à demander que sa plainte fût prise en considération, vu que le droit de suffrage a été étendu aux personnes ci-dessus mentionnées par l'Acte de Québec, 52 Vict., chap. 4, sect. 3, que les listes électorales pour les élections parlementaires de la province de Québec doivent être faites chaque année, du premier au quinze mars, d'après le rôle d'évaluation (sec. 4), et que le dit rôle d'évaluation doit comprendre les noms des fils de propriétaires et cultivateurs qui ont droit de vote en vertu de la sec. 3 du même Statut (sec. 7);

" Attendu qu'il a été prouvé devant moi que les dites personnes sont dûment qualifiées à être électeurs parlementaires pour la province de Québec, comme fils de cultivateurs et de propriétaires ;

" Vu les articles 737 et 746A, et 1061 du Code municipal, ordonne à la Corporation intimée, à son Conseil et à ses officiers, et nommément au secrétaire-trésorier du Conseil de la dite paroisse de porter, sous huit jours de la signification du présent jugement, sur le rôle d'évaluation susdit, les personnes suivantes, fils de cultivateurs et de propriétaires de la dite municipalité de la paroisse de Ste-Geneviève, dûment portés au rôle d'évaluation actuellement en force, les dits fils de propriétaires et de cultivateurs dûment qualifiés comme électeurs parlementaires pour la dite province, savoir : Joseph et Pierre Payment, fils majeurs de Toussaint Payment, Ovila Legault, fils majeur de Aldéric Legault, Camille Brunet, Albert Brunet et Etienne Brunet, fils majeurs de François-Xavier Brunet ; le tout avec dépens, etc."

F. D. Monk, for appellant.

Prévost & Bastien, for respondents.

A KAFIR LAWSUIT.

A Kafir in the witness-box is often a surprise to those who know little or nothing of the traditions of the Kafir race. The ease with which the ordinary native parries the most dexterous cross-examination, the skill with which he extricates himself from the consequences of an unfortunate answer, and, above all, the ready and staggering plausibility of his explanations, have often

struck those who come in contact with him in the law Courts. He is far superior, as a rule, to the ordinary European in the witness-box. Keen witted and ready, he is yet too cautious ever to answer a question the drift of which he does not clearly foresee, and which, when he understands, he at once proceeds, if necessary, to forestall by his reply. As a result, the truth of his evidence can only be sifted by a very careful proceeding on the part of the cross-examiner, and by keeping him in the dark as much as possible as to the bearing of his answers upon the subject-matter of the suit. Whether this dialectic skill is innate in the Kafir, or whether it is the result of long cultivation, it is difficult to say ; but, as some proof of the former, we subjoin a very interesting extract from a book now unhappily becoming rare—viz: Colonel Maclean's 'Handbook of Kafir Laws and Customs, compiled from Notes by Mr. Brownlee, Rev. Dugmore, and Mr. Ayliff,' which will, we venture to think, throw a great deal of light upon the present abilities of the descendants of those whose judicial customs fifty years ago are so graphically described in the following words : 'When a Kafir has ascertained that he has sufficient grounds to enter on an action against another, his first step is to proceed, with a party of his friends or adherents, armed, to the residence of the person against whom his action lies. On their arrival they sit down together in some conspicuous position, and await quietly the result of their presence. As a law party is readily known by the aspect and deportment of its constituents, its appearance at any kraal is the signal for the mustering of all the adult male residents that are forthcoming. These accordingly assemble and also sit down together within conversing distance of their generally unwelcome visitors. The two parties, perhaps, survey each other in silence for some time. "Tell us the news," at length exclaims one of the adherents of the defendant, should their patience fail first. Another pause sometimes ensues, during which the party of the plaintiff discuss in an undertone which of their party shall be "opening counsel." This decided, the learned gentleman commences a minute statement of the

case, the rest of the party confining themselves to occasional suggestions, which he adopts or rejects at pleasure. Sometimes he is allowed to proceed almost uninterrupted to the close of the statement, the friends of the defendant listening with silent attention, and treasuring up in their memories all the points of importance for a future stage of the proceedings. Generally, however, it receives a thorough sifting from the beginning, every assertion of consequence being made the occasion of a most searching series of cross-questions. The case thus fairly opened, which occupies several hours, it probably proceeds no further the first day. The plaintiff and his party are told that the "men" of the place are from home, that there are none but "children" present, who are not competent to discuss such important matters. They accordingly retire with the tacit understanding that the case is to be resumed the next day. During the interval the defendant formally makes known to the men of the neighbouring kraals that an action has been entered against him, and they are expected to be present on his behalf at the resumption of the case. In the meantime, the first day's proceedings having indicated the line of argument adopted by the plaintiff, the plan of defence is arranged accordingly. Information is collected, arguments are suggested, precedents sought for, able debaters called in, and every possible preparation made for the battle of intellects that is to be fought on the following day. The plaintiff's party, usually reinforced both in mental and material strength, arm the next morning and take up their ground again. The opponents, now mustered in force, confront them, seated on the ground, each man with his arms at his side. The case is resumed by some advocate for the defendant requiring a restatement of the plaintiff's grounds of action. This is commenced by one who was not even present at the previous day's proceedings, but who has been selected for this more difficult stage on account of his debating abilities. Then comes the tug of war; the ground is disputed inch by inch; every assertion is contested, every proof attempted to be invalidated, objection meets objection, and

question is opposed by counter-question, each disputant endeavouring with surprising adroitness to throw the burden of answering on his opponent. The Socratic method of debate appears in all its perfection, both parties being equally versed in it. The rival advocates warm as they proceed, sharpening each other's ardour, till from the passions that seem enlisted in the contest a stranger might suppose the interests of the nation were at stake and dependent upon the decision. When these combatants have spent their strength, or one or other of them is overcome in argument, others step to the rescue. The battle is fought over again, and on different ground, some point either of law or evidence that had been purposely kept in abeyance being now brought forward, and perhaps the entire aspect of the case changed. The whole of the second day is frequently taken up with this intellectual gladiatorship, and it closes without any other result than an exhibition of the relative strength of the opposing parties. The plaintiff's company retire again; and the defendant and his friends review their own position. Should they feel that they have been worsted, and that the case is one that cannot be successfully defended, they prepare to attempt to bring the matter to a conclusion by an offer of the smallest satisfaction the law allows. This is usually refused, in expectation of an advance in the offer, which takes place generally in proportion to the defendant's anxiety to prevent an appeal to the chief. Should the plaintiff at length accede to the proposed terms they are fulfilled, and the case is ended by a formal declaration of acquiescence.—*Cape Law Journal*.

APPEAL REGISTER—MONTREAL.

Wednesday, Jan. 15.

Commissaires d'Ecole & Hus.—Mandamus to School Commissioners. Cause declared privileged.

Ross & Holland et al.—Petition to be allowed to take up *instance* rejected, the court having no jurisdiction.

Reg. v. Remi Lamontagne. Petition for *habeas corpus*. Mr. Panneton, Q.C., for petitioner; Mr. Bélanger for the Crown. Petition rejected.

Ex parte Alfred Bertin.—Petition for habeas corpus. Writ granted, returnable at 2 p.m.

Guesremont v. Guesremont.—Motion for leave to appeal from interlocutory judgment, granted.

Picault & Guyon Lemoine.—Struck from the roll of inscriptions.

Upper Canada Furniture Co. & Shaw.—Heard. C. A. V.

Ex parte Alfred Bertin.—Writ of habeas corpus returned at 2 p.m., Mr. Robidoux, Q.C., for the prisoner; Mr. Hall, Q.C., for the Crown. Writ quashed, and prisoner re-committed.

Thursday, Jan. 18.

Corporation of County of Shefford & Corporation of St. Valerien de Milton.—Motion of respondents to dismiss appeal. C.A.V.

Corporation of County of Shefford & Corporation of Ste. Cecile de Milton.—Motion of respondents to dismiss appeal. C.A.V.

Vogt & Richter.—Petition for leave to appeal from interlocutory judgment, granted.

Commissaires d'Ecole de la paroisse de St. Victoire & Hus.—Heard. C.A.V.

Gerhardt & Davis.—Heard. C.A.V.

Pratt & Charbonneau et al.—Two appeals. Part heard.

Friday, Jan. 17.

Pratt & Charbonneau.—Two appeals. Hearing concluded. C.A.V.

Jetté et al. & Dorion.—Heard.—C.A.V.

Canadian Pacific Railway Co. & Johnson.—Heard. C.A.V.

Schwarsenski & Vineberg.—Part heard.

Saturday, Jan. 18.

Schwarsenski & Vineberg.—Hearing concluded. C.A.V.

Fraser & Brunette. Part heard.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Jan. 18.

Judicial Abandonments.

Auguste d'Anjou, trader, St. Mathieu, County of Rimouski, Jan. 14.

Mary Susan Davis, doing business as Castle & Co. Montreal, Jan. 14.

Prosper Philippe Mercier, Sweetburg, Jan. 7.

Zéphirin Vandy, plumber, Quebec, Jan. 11.

Curators appointed.

Re Hyman Bereovitch.—W. A. Caldwell, Montreal,

curator, Jan. 13.

Re René Bernard, contractor and builder, St. Hyacinthe.—F. X. A. Boisseau, St. Hyacinthe, curator, Jan. 11.

Re A. Blumenthal & Co., Montreal.—Kent & Turcotte, Montreal, joint curator, Jan. 15.

Re Didace Bonin, contractor, parish of St. Antoine.—A. M. Archambault, N.P., curator, Dec. 30.

Re N. Bourgeois & Co.—C. Desmarceau, Montreal, curator, Jan. 13.

Re P. C. Dantell & Co., Quebec.—Kent & Turcotte, Montreal, joint curator, Jan. 8.

Re J. Hodges.—W. A. Caldwell, Montreal, curator, Jan. 13.

Re E. D. Marceau, trader, l'Isle Verte.—H. A. Bedard, Quebec, curator, Jan. 14.

Re J. O. Massicotte.—C. Desmarceau, Montreal, curator, Jan. 16.

Re J. B. L. Rolland & Co.—C. Desmarceau, Montreal, curator, Jan. 10.

Re F. J. Soheak & Co., traders, Montreal.—W. J. Common, Montreal, curator, Jan. 11.

Re M. Tessier, boot and shoe manufacturer, Montreal.—A. F. Riddell, Montreal, curator, Jan. 15.

Re Antoine Trahan.—Millier & Griffith, Sherbrooke, joint curator, Jan. 15.

Dividends.

Re George Bisset.—First dividend, payable Jan. 25, James Reid, Quebec, curator.

Re Joe E. Hallée, grain merchant, Quebec.—Dividend, payable Feb. 4.

Re J. B. A. Lambert, tobacconist, Quebec.—First and final dividend, payable Feb. 3, H. A. Bedard, Quebec, curator.

Re Quebec Shoe Co.—Second dividend (\$ c.), payable Jan. 29, D. Arcaud, Quebec, liquidator.

Separation as to property.

Marie Elizabeth Hermine Beaudry vs. Prosper Philippe Mercier, mill owner and trader, parish of St. Valerien de Milton, Jan. 8.

Marie Aurélie Labelle vs. Isaye Bigras, blacksmith, St. Enfant Jésus, district of Montreal, Jan. 15.

Celima Renaud dite Dumoulin vs. Félix Drolet, teacher, township of Ditton, district of St. Francis, Jan. 8.

Eugénie Sarrazin dit Depelteau vs. Léopold Vigeant, clerk, St. Jean, Jan. 13.

THE JUDGE'S SUGGESTION.—In one of the interior counties of Maine, a case was called which had long been in litigation. The chief justice—who at that time was plain Judge Peters—thought it impracticable to keep the suit longer in court, and advised the parties to refer the matter. After due deliberation they assented, agreeing to refer the case to three honest men. With a grave smile, in perfect keeping with judicial dignity, Judge Peters said that the case involved certain legal points which would require one of the referees, at least, to have some knowledge of law; therefore he would suggest the propriety of their selecting one lawyer and two honest men! The suggestion evoked a roar of laughter, which proved to be a happy harbinger of an amicable settlement.—*Levinston Journal*

The Legal News.

VOL. XIII. FEBRUARY 1, 1890. No. 5.

The decision of our Court of Appeal in *Davie & Sylvestre*, M. L. R., 5 Q. B. 143, as to what constitutes a partnership as to third persons, has attracted considerable attention. However simple the principles which regulate the question may appear, the application of them to the practical concerns of men has exercised the acutest intellects. The case of *Davie & Sylvestre* was of course governed by our own system of law and the articles of the Code. Mr. Justice Bossé, who rendered the judgment in appeal, observed that if he were bound by some of the English and modern French authorities cited, he would have some hesitation in declaring that a partnership existed as to third persons. It may be interesting, therefore, to note that the New York Court of Appeals, a few days later, rendered a judgment in the same sense, in *Hackett v. Stanley*, the essential particulars of which bear a strong resemblance to those of *Davie & Sylvestre*. Chief Justice Ruger reviews the recent decisions on the subject.

The members of the Bar, both in Montreal and Quebec, have carried resolutions adverse to the B. A. Bill which passed the legislative assembly last year, but which was defeated in the legislative council. The leading members of the Bar in Montreal have supported the bill, and the majority of the General Council have also approved of it; but on a vote of 225 members the bill has only received the approval of a little more than one-third. The impression apparently exists that there are enough lawyers for the business offering (which is quite true), and that there must be no relaxation but rather an increase of vigilance in guarding the portal of the profession. Since these votes were taken, the bill has passed its second reading in the legislative assembly. The legislature has the right and the power to

say what rules shall exist with reference to admission to the study of the professions, but we feel some doubt as to the policy of overruling a strong adverse vote of the bar. At the same time we regret that such a vote has been recorded. Our regret is not so much with reference to the fate of the bill, but because such a vote is a discouragement of University education as a preliminary to professional study.

The reading of the Commission appointing the Hon. F. G. Johnson, Chief Justice of the Superior Court, was an occasion of unusual interest, and in our next issue we propose to place on record the addresses delivered, which are not without historical importance. The names of some of those who took part in the ceremony link the present with the early history of the country. The learned Chief Justice himself was able to refer to his part in a memorable trial which took place on the same spot more than half a century ago—before Responsible Government had been secured for Canada. Mr. J. J. Day, Q.C., who spoke on the occasion, was admitted to the bar in June, 1834, and the commission was read by Mr. John Sleep Honey, who has been for fifty-seven years an officer of the Court.

SUPREME COURT OF CANADA.

OTTAWA, Dec. 4, 1889.

Quebec.]

CHAGNON V. NORMAND.

Appeal—Jurisdiction—From Province of Quebec—Supreme Court Act, Sec. 29 (b)—Future Rights—Quebec Election Act—Action for penalties for bribery—Effect of judgment—Disqualification.

By Art. 414 of the Revised Statutes of Quebec any person guilty of bribery at a provincial election is liable to a penalty of \$200 for each offence, for which any person may sue.

By Art. 429 any person convicted on indictment of such bribery is disqualified for seven years from being a candidate at an election or holding office under the Crown.

N. brought an action for bribery under

Art. 414 against C, in which penalties to the extent of \$400 were imposed on C. The Court of Queen's Bench affirmed the judgment imposing such penalties, and C. sought to appeal to the Supreme Court of Canada. On motion to quash the appeal for want of jurisdiction,

Held: That even if the judgment imposing penalties had the effect of disqualifying C. as if he had been convicted under Art. 429, no appeal would lie. The only ground of jurisdiction would be that future rights would be affected by the judgment, but under sec. 29 (b) of the Supreme Court Act, the future rights must be affected by the matter actually in controversy and not by something collateral thereto.

Semble, that the judgment would not have the effect of so disqualifying C.

Appeal quashed with costs.

J. J. Gormully, for respondent.

Christopher Robinson, Q.C., for appellant.

Quebec.]

HOOD V. SANGSTER.

Action for partition and licitation of property—Partnership—Plaintiff's interest less than \$2,000—Not appealable—R. S. C. ch. 135, sec. 29.

An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, etc., in order that the proceeds might be divided according to the rights of the parties who had carried on business as partners. The judgment appealed from ordered the licitation of the factory and its appurtenances. On a motion to quash the appeal by the respondent on the ground that the matter in controversy was under \$2,000, the appellant, in answer to the respondent's affidavit, filed another affidavit, showing that the total value of the property was \$3,000, but it being admitted that the respondent (plaintiff) claimed but one-half interest in the property, it was

Held, that the matter in controversy and claimed by the respondent not amounting to the sum or value of \$2,000, the appeal should be quashed with costs.

Appeal quashed with costs.

Duclos, for respondent.

MacLennan, contra.

Quebec.]

MONTREAL STREET RAILWAY CO. v. RITCHIE.

Injunction—41 Vic., ch. 14, sec. 4, P. Q.—Action for damages—Want of probable cause—Damages other than costs.

Where a registered shareholder of a company, finding the annual reports of the company misleading, applies after notice for a writ of injunction to restrain the company from paying a dividend, and where, upon such application, the company do not deny even generally the statements and charges contained in the plaintiff's affidavit and petition, there is sufficient probable cause for the issue of such writ, and consequently the defendant, who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction.

Per Taschereau, J. Where a party maliciously and without reasonable and probable cause has instituted civil proceedings against another, the latter has a right of action for damages resulting from such vexatious proceedings. *Brown v. Gudy*, 16 L. C. Jur. 227, approved of.

Appeal dismissed with costs.

Geoffrion, Q.C. and H. Abbott, Q.C., for appellants.

Loneragan and Lafleur, for respondents.

OTTAWA, October 28, 1889.

New Brunswick.]

SCAMMELL V. JAMES.

Appeal—Jurisdiction—Security for costs—Benefit of bond for—Practice.

S. brought an action by writ of *capias* in the Supreme Court of New Brunswick against J., who was arrested and gave bail. By the practice in bailable actions in that province, it was necessary for the defendant to enter into special bail within a specified time after his arrest, and judgment must be entered within a specified time after such special bail is entered into. The plaintiff delayed signing judgment, and on application to a judge in chambers, an order was made discharging the bail, and directing an exoneration to be entered on the bail bond. On motion to the full court this order was sustained, and the plaintiff appealed to the

Supreme Court of Canada. The proceedings in the Court below and on appeal were in the original suit against J., and the bond for security of costs was made in favor of J.

Held: That the bail, the parties principally interested in the appeal, not being entitled to the benefit of the security for costs, the appeal could not be entertained for want of security, and the time for giving security having elapsed the defect could not be remedied.

Held also, that the matter was one of the practice of the Court below, and on that ground not appealable.

McLeod, Q.C., and *C. A. Palmer*, for the appellants.

I. A. Jack, Recorder of St. John, for the respondent.

New Brunswick.]

OTTAWA, Oct. 26, 1889.

WHITE v. PARKER.

Appeal—Jurisdiction—Death of plaintiff—New cause of action—Lord Campbell's Act—Actio personalis moritur cum persona.

P. brought action against a railway conductor for injuries received in attempting to board a train. He was non-suited on the trial of the action, and the Supreme Court of New Brunswick set aside the non-suit and ordered a new trial. Between the verdict and the judgment of the Court below P. died, and a suggestion of his death was entered on the record in the Court below. On appeal to the Supreme Court of Canada from the judgment ordering a new trial;—

Held: That by the death of P. a new cause of action arose, under Lord Campbell's Act, in favor of his widow and children, and the original action was entirely gone and could not be revived. There being, therefore, no cause before the Court, the appeal was quashed without costs.

McLeod, Q.C., for appellant.

W. Pugsley, for respondent.

New Brunswick.]

OTTAWA, Oct. 26, 1889.

MCDONALD v. GILBERT.

Partnership—Proof of—Names of partners on letter heads—Action for trifling amount.

G. bought goods from a person represent-

ing himself as agent of a firm in Toronto, and the goods were sent from Toronto to G. at St. John, N.B. In order to get the goods, G. was obliged to pay the freight, which he demanded from the firm, claiming that by his agreement with the agent he was to receive the goods at St. John on payment of the price. Some correspondence passed between G. and the firm, and letters were received by G. written on paper containing the name of the firm and under it the names of individuals. In an action by G. to recover the freight,

Held: Affirming the judgment of the Supreme Court of New Brunswick, that the representation of the agent, coupled with the receipt of the said letters, was sufficient *prima facie* evidence that the persons whose names were printed on the letter heads constituted the said firm.

It appeared that the amount for which the action was brought was only twenty-two dollars, and the Court, though unable to refuse to hear the appeal, expressed strong disapproval of the appellant's course in bringing an appeal for such a trifling amount.

Appeal dismissed with costs.

Weldon, Q.C., for appellants.

Barker, Q.C., for respondent.

COURT OF APPEALS.

NEW YORK, Oct. 8, 1889.

HACKETT v. STANLEY.

Partnership—What constitutes.

An agreement read as follows: "For and in consideration of \$750, for use in business of heating, ventilating, etc., for which said party of the first part has given unto said party of the second part his note at two years, and in further consideration of services of said party of second part in securing sales in said business, and for any further moneys he may, at his own option, advance for me in said business, the said party of the first part agrees to divide equally the yearly net profits of said business. It is understood and agreed that said loan of \$750 is expressly for use in said business, and for no other use whatever." It was further agreed that advances by either party might be with-

drawn, at the option of the party making them, and were to bear interest while used in the business. The party of the first part was to be allowed \$1,000 per year for managing the business, and quarterly statements of its condition were to be made by him to the party of the second part.

Held:—*That the latter was, as to third persons, a partner with the former, although such third persons gave credit wholly to the other partner, and were ignorant of the partnership.*

Appeal from Common Pleas of New York city and county, General Term.

Action for materials and labor. James Stanley appeals from a judgment for plaintiff.

RUGER, C. J. The determination of this case involves the construction of an agreement between James Stanley and Moulton W. Gorham, and the question whether such agreement constituted the defendant Stanley a partner as to third persons with Gorham. If it did, then the judgment must be sustained. The liability of the alleged partners is predicated upon a debt for services rendered and materials furnished by the plaintiffs, upon the request of Gorham, in fitting up a place in New York to carry on the business of heating, ventilating, etc. The part of the agreement which, it is claimed, creates the partnership reads as follows: "That for and in consideration of the loan of \$750 from the said party of the second part to the said party of the first part, for use in the business of heating, ventilating, etc., for which said party of the first part has given unto said party of the second part his note at two years with interest, bearing date January 14, 1885, payment of which is secured by an assignment of said value in a certain \$3,000 policy in the Massachusetts Mutual Life Insurance Company, and also by a certain chattel mortgage, bearing date January 23, 1885, and in further consideration of services of said party of the second part in securing sales in said business, and for any further moneys he may, at his own option, advance for me in said business, the said party of the first part agrees to divide equally the yearly net profits of the said business.

It is understood and agreed that said loan of \$750 is expressly for use in said business, and for no other use whatever." It was further provided that advances made by either party in the business were at all times subject to be withdrawn, at the option of the party making them, and were to bear interest while used in the business. Gorham was to be allowed \$1,000 per annum for his services in managing the business, and quarterly statements of its condition were to be made by him to Stanley.

It is fairly to be implied from the contract that Gorham was to be the active man in the business, and it was to be carried on in his name: but whether he was to furnish any capital, and if so, how much, is not disclosed. For aught that appears, the money furnished by Stanley was all that was supposed to be necessary to start and carry on the business until returns were realized from its prosecution.

This agreement does not, in express terms, purport to form a partnership; neither is the intention to do so disclaimed; and the question is therefore whether, in a business carried on under the conditions provided for in the contract, the parties thereto became partners, as to third persons. It clearly provides for something more than a loan of money, as it is fairly to be implied from it that Stanley would render active services as a principal in the prosecution of the business, and furnish further financial aid therefore, if it became necessary, and he deemed it advisable to do so. The loan was not one made to Gorham generally, but was for the benefit of the particular business, in whose prosecution Stanley had an equal interest, and any diversion of the funds from such use was strictly prohibited. Each party was authorized to charge the business with interest on the funds advanced by him for its prosecution, and they would each be entitled to *pro rata* reimbursement of such funds from the assets of the business, in case of a deficiency in assets to pay the advances in full. In that respect it was evidently contemplated that each party should bear any loss incurred, in proportion to the advances made by them respectively. For all this, Stanley was to receive one-half the net profits

of the business. His right to profits would not cease upon the repayment of the original loan, or depend upon the value of the services rendered or moneys advanced, or either of them alone, but was to continue as long as the business was carried on. The letter of the contract is that in consideration of the loan of \$750, payable in two years, and the further consideration of services in securing sales in said business, and further moneys furnished, the net profits are to be divided. The services promised, and the moneys advanced and to be advanced, each and all constituted the consideration for the division of the profits. We think such an agreement, within all authorities, constitutes a partnership as to third parties. By it, Stanley had an interest in the general business of the concern; a right to require a quarterly account of its transactions; authority to make contracts in its behalf; and an irrevocable right to demand one-half of the profits of the business. That the original loan of \$750 was secured to be repaid by Gorham to Stanley does not preclude the conclusion that they were partners; for it is entirely competent for one partner to guaranty another against loss, in whole or in part, in a partnership business, if the parties so agree. The application of the rule that "participation in profits" renders their recipient a partner in the business from which profits are derived, as to third persons, has been somewhat restricted by modern decisions; but we think that the division of profits must still be considered the most important element in all contracts by which the true relation of parties to a business is to be determined. We think this rule is founded in strict justice and sound policy. There can be no injustice in imposing upon those who contract to receive the fruits of an adventure a liability for debts contracted in its aid, and which are essential to its successful conduct and prosecution. This liability does not, and ought not to, depend upon the intention of the parties, in making their contract, to shield themselves from liability, but upon the ground that it is against public policy to permit persons to prosecute an enterprise which, however successful it may for a time appear to be, is sure in the end to result in the advantage of its

secret promoters alone, and the ruin and disaster of its creditors and others connected with it. *Atherton v. Tilton*, 44 N. H. 452; *Chase v. Barrett*, 4 Paige, 159. Expected profits being the motive which induces the prosecution of all commercial and business enterprises, their accumulation and retention in business are essential to their success; and if persons are permitted, by secret agreement, to appropriate them to their own use, and throw the liabilities incurred in producing them upon those who receive only a portion of the benefits, not only is a door opened to the perpetration of frauds, but such frauds are rendered inevitable. Exceptions to the rule are, however, found in cases where a share in profits is contracted to be paid as a measure of compensation, to employees, for services rendered in the business, or for the use of moneys loaned in aid of the enterprise; but where the agreement extends beyond this, and provides for a proprietary interest in the profits as a compensation for moneys advanced and time and services bestowed as a principal in its prosecution, we think that the rule still requires such party to be held as a partner.

The rule laid down in Kent's Commentaries (vol. 3, p. 25, note b), that "the test of partnership is a community of profit; a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services"—was approved by this court in *Leggett v. Hyde*, 58 N. Y. 272, in which case Judge Folger says: "The courts of this State have always adhered to this doctrine, and applied or recognized it in the cases coming before them." After citing numerous cases in support of the statement, he proceeds: "There have been from time to time certain exceptions established to this rule, in a broad statement of it; but the decisions by which these exceptions have been set up still recognize the rule that where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker or employee who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the

profits." The learned judge, after referring to the English cases claimed to have qualified, if not overruled, the cases of *Grace v. Smith*, 2 W. Bl. 998, and *Waugh v. Carver*, 2 H. Bl. 235, which were the foundation of the doctrine that a participation in profits renders those receiving them partners, says that "without discussing those decisions, and determining just how far they reach, it is sufficient to say that they are not controlling here; that the rule remains in this State as it has long been; and that we should be governed by it until here, as in England, the Legislature shall see fit to abrogate it." The same remark may also be applied to the cases of *Harvey v. Childs*, 28 Ohio St. 319; *Hart v. Kelley*, 83 Penn. St. 286; *Beecher v. Bush*, 45 Mich. 188; *Eastman v. Clark*, 53 N. H. 276; *Emmons v. Bank*, 97 Mass. 230—decided in the courts of our sister States, in which the distinction between contracts of partnership *inter sese* and those making the parties partners as to third persons, although not so as between themselves, is sought to be practically abolished. The doctrine that persons may be partners as to third persons, although not so as between themselves, and although the contract of partnership contains express provisions repudiating such a relation, has been too firmly established in this State by repeated decisions to be now disregarded by its courts. See cases cited in *Leggett v. Hyde*. It is claimed that this doctrine has been practically overruled in this State by the decisions in this court of *Richardson v. Hughitt*, 76 N. Y. 55; *Burnett v. Snyder*, id. 344; *Eager v. Crawford*, id. 97; *Curry v. Fowler*, 87 id. 33; and *Cassidy v. Hall*, 97 id. 159. We do not think these cases had the effect claimed. They were all cases distinguished by peculiar circumstances, taking them out of the operation of the general rule. It cannot be disputed but that a loan may be made to a partnership firm on conditions by which the lenders may secure a limited or qualified interest in certain profits of the firm, without making them partners in its general business; but that is not this case.

In *Richardson v. Hughitt*, *supra*, Bench Bros. & Co. were a manufacturing firm, carrying on the business of making wagons,

and Hughitt contracted to advance to them \$50 on each wagon manufactured by them and delivered to him, to the extent of two hundred wagons, under an agreement that upon the sale of the wagons he was to receive back the moneys advanced, with interest, and one-fourth of the net profits on such wagons. It was held that this was a mere loan of money, providing for an interest in the profits as a compensation for the money loaned. The lender secured no interest in the general business of the firm, or interest in the profits made therein, and did not become liable for its debts. It is quite clear that if such a contract had been made after the wagons were finished, it would have created simply a pledge of property for the payment of a debt, competent for the parties to make, and which would not have made the pledgee a partner. The fact that the contract was executory would not alter the real nature of the transaction or affect the relations of the parties to third persons. The case of *Eager v. Crawford*, *supra*, was a pure loan of money, with an agreement that the borrower should pay to the lender, on the first day of each month, one-half of the gross receipts of the business carried on by him, until the whole sum, with interest, was repaid. The dispute in the case was upon the question whether the stipulation for one-half the gross receipts was intended to refer to profits. The question submitted to the jury, the evidence being conflicting, was whether it was "the real understanding between the parties that Crawford should participate in the profits, as such. If it was, it would constitute a partnership;" otherwise not. This court approved the charge. In *Burnett v. Snyder*, *supra*, two of the members of an existing firm, composed of five persons, agreed with Snyder, for a good consideration, that if he would become liable to them for one-third of the losses sustained by them in the business of their firm they would pay to him one-third of the profits received by them in such business. For obvious reasons, it was held that Snyder, under this agreement, took no interest in the general business of the firm, and did not become a member thereof. In *Curry v. Fowler*, *supra*, W. G. and J. E. McCormick were an existing firm, owning certain vacant

real estate in New York, which they desired to improve. To enable them to do so, Fowler loaned \$50,000 to them; taking as security therefor a mortgage upon the land, with an agreement that he should be repaid his loan and interest, with one-half the profits of the adventure, which the McCormicks guaranteed should amount to \$12,500. This case was decided upon the authority of *Richardson v. Hughitt*, and was said to resemble it in all essential particulars. In *Casidy v. Hall*, *supra*, it was held that the defendants were mere lenders of money to an existing corporation. The opinion states that "under the agreement the advances were to be made only upon such orders as the defendants approved, and the most that can be claimed from it is that the defendants were the financial agents of the company, to make advances and discount their paper, for the purpose of relieving the company from the financial embarrassment under which it was evidently labouring; for which they, the defendants, were to receive a proportion of the face of the orders upon which the advances were made as a compensation for the risks they incurred, and for the use of the money advanced by them. They were not generally interested in the affairs of the company, but only for a special and specific purpose; and in no sense were they partners." It cannot reasonably be claimed that either of these cases is an authority for the reversal of this judgment. Whatever might have been their bearing if they related to the loan of money alone, we will not say; but when connected with the circumstance that the defendant was expected to render future services as a principal, and furnish further financial aid, with a certain supervision over the conduct of the business, we think this case is clearly distinguishable from those cited.

In the view taken of this case, it is quite immaterial whether the plaintiff extended the credit to Gorham alone or not, as the defendant was held liable upon the ground that, as to third persons, he was a partner; and it did not affect that liability, whether the plaintiff knew the fact or not.

The exception to the ruling of the court sustaining the objection to the question put

to plaintiff on cross-examination, as to whom the credit was furnished, was not well taken, as the fact sought to be proved was immaterial. The judgment should therefore be affirmed. All concur.

APPEAL REGISTER—MONTREAL.

Monday, January 20.

Fraser & Brunette.—Hearing concluded. C. A. V.

Barnard & Molson.—Hearing concluded. C. A. V.

Fournier & Leger.—Part heard.

Tuesday, Jan. 21.

Fournier & Leger.—Hearing concluded. C. A. V.

Cie de Navigation & Desloges.—Heard. C. A. V.

Guimond & Scurs de l'Hotel Dieu.—*Délibéré* discharged by consent.

Trustees of Montreal Turnpike Roads & Rielle.—Part heard.

Wednesday, January 22.

Montreal Street Ry. Co. & City of Montreal.—Motion for leave to appeal to Privy Council rejected with costs.

Fahey & Baxter.—*Délibéré* discharged.

Montreal Street Ry. Co. & Lindsay.—Confirmed.

Dorion & Dorion (No. 68).—Reformed, with costs of 1st class in favor of appellant, J. B. T. Dorion.

Dorion & Dorion (No. 153).—Judgment reformed; respondent to render an account within two months, or pay \$13,500, in lieu of *reliquat de compte*, with costs of 1st class in favor of appellant P. A. A. Dorion.

Laforce & Le Maire et al. de Sorel.—Confirmed, but for a different reason, with costs of 1st class. Tessier, J., differs as to costs in appeal.

Webster & Taylor.—Confirmed.

Marion & Maitre Général des Postes.—Reversed.

Brulé et vir & Bussières, & Prevost.—Confirmed.

Trustees of Montreal Turnpike Roads & Rielle.—Hearing concluded. C. A. V.

Exchange Bank & Gilman.—Heard. C. A. V.

Thursday, Jan. 23.

Joyal & Deslauriers.—Heard. C. A. V.

Gilmour & Ethier.—Heard. C. A. V.

Robin dit Lapointe & Brière.—Part heard.

Friday, January 24.

Robin dit Lapointe & Brière.—Hearing concluded. C. A. V.

Archambault & Bourgeois.—Heard. C. A. V.

Cie. Chemin de Jonction de Beauharnois & Leduc.—Heard C. A. V.

Cie. Chemin de Jonction de Beauharnois & Douce.—Heard. C. A. V.

Saturday, January 25.

Corporation du Comité de Shefford & Corporation St. Valérien de Milton.—Appeal dismissed.

Corporation du Comité de Shefford & Corporation Ste. Cécile de Milton.—Appeal dismissed.

McLachlan & Accident Ins. Co. of N. A.—Reversed without costs, and case sent back to Superior Court. Church, J., diss.

Peloquin & Cardinal.—Appeal maintained in part.

McShane & Brisson.—Reversed. No costs allowed.

Monday, January 27.

Rogalsky & Levy.—Motion for leave to appeal from interlocutory judgment dismissed.

Ex parte J. Ansermoz.—Petition to be admitted a bailiff granted.

Clendinning & Pont.—Motion for leave to appeal from interlocutory judgment granted.

Royal Institution & Scottish Union & National Ins. Co.—Heard. C. A. V.

The Court adjourned to Saturday, March 15.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Jan. 25.

Judicial Abandonments.

Joseph Landsberg, trader, Sherbrooke, Jan. 20.
Ferdinand Mailhot, trader, St. Jean Deschaillons, Jan. 18.

Johnny Morissette, trader, St. Charles de Bellechasse, Jan. 18.

Abraham Simard, general storekeeper, Thetford Mines, Jan. 21.

Curators appointed.

Re Armstrong Photo-Engraving Co.—H. A. Jackson, Montreal, curator, Dec. 28.

Re Pierre Blais, trader, Ste. Flore.—J. E. Bedard, Quebec, curator, Jan. 16.

Re Leonidas A. Bergevin, dry goods merchant, Quebec.—H. A. Bedard, Quebec, curator, Jan. 18.

Re Blake Bros., Carmel Hill, township of Wendover.—Joseph Patrick, Carmel Hill, curator, Jan. 22.

Re Bonin & Allaire, Montreal.—Kent & Turcotte, Montreal, joint curator, Jan. 22.

Re Ubalde Capistrano.—C. Desmarteau, Montreal, curator, Jan. 21.

Re J. A. Coté, St. Wenceslas.—Kent & Turcotte, Montreal, joint curator, Jan. 16.

Re Michael Deery, grocer, Montreal.—P. E. Emile de Lorimier, Montreal, curator, Jan. 21.

Re Mary Susan Davis (Castle & Co.), Montreal.—John Fulton, Montreal, curator, Jan. 22.

Re Gagnon frère & Cie., traders, Quebec.—J. M. Marcotte, Montreal, curator, Jan. 21.

Re A. Gauthier, Ste. Justine de Newton.—Kent & Turcotte, Montreal, joint curator, Jan. 23.

Re Edmond Labelle, Montreal.—Kent & Turcotte, Montreal, joint curator, Jan. 22.

Re Prosper Philippe Mercier.—P. S. Grandpré, St. Valérien, County of Shefford, curator, Jan. 15.

Re Wm. Stanley, bookseller, Quebec.—H. A. Bedard, Quebec, curator, Jan. 23.

Dividends.

Re A. E. Boisseau, dry goods merchant, Quebec.—Second dividend, payable Feb. 10, H. A. Bedard, Quebec, curator.

Re Henry T. Farley, Drummondville.—First and final dividend, payable Feb. 10, J. McD. Hains, Montreal, curator.

Re F. X. Lamothe, trader, Upton.—First and final dividend, payable Feb. 11, J. Morin, St. Hyacinthe, curator.

Re Alex. Mahen, St. Chrysostome.—First dividend, payable Feb. 26, Kent & Turcotte, Montreal, joint curator.

Re Prévost, Prévost & Cie., Montreal.—First dividend, payable Feb. 26, Kent & Turcotte, Montreal, joint curator.

Re Laurent Toutant, Three Rivers.—Dividend on proceeds of real property, payable Feb. 13, Kent & Turcotte, Montreal, joint curator.

Re Valois, Lusignan & Co., Montreal.—First and final dividend, payable Feb. 20, Kent & Turcotte, Montreal, joint curator.

Separation as to Property.

Célanire Vandry vs. Napoléon Monette, contractor, Montreal, Jan. 17.

A PUZZLE FOR THE GAOLER.—Judge Kent, the well-known jurist, presided in a case in which a man was indicted for burglary; and the evidence at the trial showed that the burglary consisted in cutting a hole through a tent in which several persons were sleeping, and then projecting his head and arm through the hole and abstracting various articles of value. It was claimed by his counsel that, inasmuch as he never entered into the tent with his whole body, he had not committed the offence charged, and must therefore be set at liberty. In reply to this plea, the judge told the jury that if they were not satisfied that the whole man was involved in the crime, they might bring in a verdict of guilty against so much of him as was involved. The jury, after a brief consultation, found the right arm, the right shoulder, and the head of the prisoner guilty of the offence of burglary. The judge accordingly sentenced the right arm, the right shoulder, and the head to imprisonment with hard labour in the State prison for two years, remarking that *as to the rest of the man's body, he might do with it as he pleased.*—*The Green Bag.*

The Legal News.

VOL. XIII. FEBRUARY 8, 1890. No. 6.

The appointments of Queen's Counsel in England have been announced, but what a contrast does the list present to those upon which we have recently commented! The *London Law Journal* says, "an addition of new silk to the Queen's Counsel bench has been expected for some time. One Queen's Counsel only was appointed last year. In February, 1888, fourteen practising barristers were made Queen's Counsel. On the present occasion seven practising barristers only are put in the front row. The appointments of Sir Augustus Stephenson, Solicitor of the Treasury and Director of Public Prosecutions, and of Sir William Hardman, formerly chairman of the Surrey Sessions, are honours well deserved from long service in public office. Mr. A. V. Dicey, junior standing counsel to the Commissioners of Inland Revenue, has long earned the right of becoming leading counsel. Mr. R. P. Haldane, M. P., is the only Chancery barrister appearing in the list. The Midland Circuit has Mr C. A. Cripps, the South-Eastern Mr. R. O. B. Lane and Mr. Sidney Woolf, the North-Eastern Mr. Cyril Dodd, and the Northern Mr. Macrory as new leaders on those circuits." It appears, therefore that in three years only twenty-two appointments have been made in England—less than the number announced on one day in the province of Quebec alone!

The death of Mr. Alfred B. Major has made a gap not easily filled in the ranks of the junior bar of Montreal. Mr. Major came here a stranger, a few years ago, and by steady application combined with fair ability, obtained admission to the profession, and was rapidly making his way to an excellent position at the bar when prostrated by the illness which, unhappily, has cut short his career. Mr. Major was the author of "Legal Sketches," a republication of papers and sketches of considerable merit, which was

favorably noticed at the time of its appearance. He was also a valued contributor to the *Montreal Law Reports*.

Pres. C. W. Needham, at the annual meeting of the Chicago Law Institute, observed:—"A library is a workshop—a place of toil and labor. No sound of hammer is heard; men move in quiet, but temples rise—temples not for idol worship, but wherein dwell rightness and truth. For come with what purpose we may, the study of great opinions, the reasoning of learned jurists, the clear presentation of sound law upon the written page, and greater still, the conviction that always accompanies truth, leads all minds to an apprehension of right principles, and the constant study of them to the practice and application of these principles to practical questions and issues. Books are thoughts crystallized—ideas in picture. We study them from without and detect the errors and apprehend the right as we cannot do by any other process. The decisions of Courts are the application of principles to practice, and we judge of the rightness of these principles, and the fitness of their application, without the prejudice or bias that comes with personal contact, or knowledge of the parties immediately interested. Nothing quickens mind like contact with mind, and in the library this process is carried on without distraction or unnecessary friction. He who establishes a library of good books, not only preserves thought, but furnishes the tools and material for the creation of new thought; and they who establish and maintain a well selected law library, not only preserve precedents, but furnish the inspiration and activity of mind that creates good law, and makes able jurists."

SUPREME COURT OF CANADA.

OTTAWA, Jan. 22, 1890.

Ontario.]

HALDIMAND ELECTION CASE.

Election law—Corrupt act—Bribery by Agent—Proof of Agency.

An election petition charged that H., an agent of the candidate whose election was

attacked, corruptly offered and paid \$5 to induce a voter to refrain from voting. The evidence showed that H. was in the habit of assisting this particular voter, and that, being told by the voter that he contemplated going away from home on a visit a few days before the election and being away on election day, he promised him \$5 towards paying his expenses. Shortly after, the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him \$5. He went away and was absent on election day.

Held, that the offer and payment of the \$5 formed one transaction, and constituted a corrupt practice under the Election Act.

The proof of H.'s agency relied on by the petitioner was, that he had been active on behalf of the same candidate at former elections; that he had attended a committee meeting held on behalf of the candidate and took part in going over the list of voters; and that he acted as scrutineer in the election in question. It was also shown that there was no regular organization of the party at the election, but the candidate had addressed a mass meeting of the electors, and stated that he placed his interests in their hands. It was contended that every member of the party was thereby constituted his agent.

Held, affirming the judgment of the trial judge, Ritchie, C. J., dissenting, and Tasche-reau, J., *hesitante*, that the agency of H. was sufficiently established to make the candidate liable for his acts, and the candidate was rightfully unseated for bribery by H.

Appeal dismissed with costs.

Aylesworth, for appellant.

McCarthy, Q. C., for respondent.

EXCHEQUER COURT OF CANADA.

OTTAWA, Jan. 20, 1890.

Coram BURRIDGE, J.

CARTER, MACY & CO. v. THE QUEEN.

Revenue—Customs duties—Goods in transitu.

The plaintiffs shipped teas from Japan to New York for transportation in bond to Canada. On the arrival of the teas at New

York and pending a sale thereof in Canada, such teas were allowed to be sent to a bond warehouse as unclaimed goods for some five or six months. They were then entered at the New York Custom House for transportation to Canada, and forwarded to Montreal.

There was nothing to show that the plaintiffs at any time proposed to make any other disposition of the teas, and there was nothing in what they did that contravened the laws or regulations of the United States or of Canada with respect to the transportation of goods in bond.

Held, that the teas were not dutiable as teas from the United States, the transaction having taken place prior to the passing of the Act 52 Vic., c. 14, which expressly provides that in such a case the teas would be dutiable.

D. Macmaster, Q. C., for claimants.

R. Sedgewick, Q. C., and *W. D. Hogg*, Q. C., for the Crown.

EXCHEQUER COURT OF CANADA.

OTTAWA, Jan. 20, 1890.

Coram BURRIDGE, J.

THE QUEEN v. THE GRAND TRUNK RAILWAY COMPANY.

Information—Damage in the nature of interest—Rate thereof.

On a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is not to be implied.

In assessing damages in the nature of interest on a bond payable at a particular place, reference should, in general, be had to the rules in force at the place where the same is so payable.

Quære: Will an action lie for interest not payable by contract, but as damages for the detention of a debt or money claim, where the principal sum had been paid to and received by the plaintiff before action brought.—*Dixon v. Parkes*, (1 Esp. 110); *Hellier v. Franklin*, (1 Starkie, 291); *Beaumont v. Greathead*, (2 C. B. 494.)

W. D. Hogg, Q. C., for the Crown.

John Bell, Q. C., for respondent.

SUPERIOR COURT—MONTREAL.*

Injonction—Pouvoirs des corporations municipales.

Jugé:—1o. Que la corporation de Ste-Cunégonde, autorisée à acheter l'aqueduc de Ste-Cunégonde et St. Henri pour une somme de \$400,000, par un Statut passé alors que l'un des deux propriétaires de l'aqueduc était interdit pour démence, ne pouvait acquérir la part de l'interdit que judiciairement; en conséquence elle pouvait acquérir privément l'autre moitié à un prix n'excédant pas la moitié de \$400,000; sauf à acquérir l'autre moitié lorsqu'elle sera vendue judiciairement soit à la poursuite des créanciers de l'interdit, ou sur licitation provoquée par l'un des copropriétaires.

2o. Qu'il doit être laissé au Conseil de ville une discrétion raisonnable dans une transaction de ce genre, et que la Cour n'interviendra pas pour l'empêcher d'acquérir la moitié de l'aqueduc, lorsqu'il prétend que c'est le seul mode pratique d'arriver à l'acquisition du tout, et qu'il est constant qu'il est de l'intérêt de la ville d'acquérir l'aqueduc.—*Roy v. La Corporation de la Ville de Ste-Cunégonde, et Berger, mis en cause, Pagnuelo, J., 2 nov 1889.*

Compensation—Pension—Nullité des arrangements durant mariage au sujet des droits des époux:—Arts. 1188, 1264, 1265, C.C.

Jugé:—1o. Qu'une dette non liquide peut quelquefois être opposée en compensation, quand elle est facilement liquidable, comme le prix d'une pension et entretien, et lorsqu'elle est liée à la créance réclamée par le demandeur, laquelle est elle-même contestée.

2o. Que la convention entre le mari et le beau-père, que le mari et la femme vivraient séparés, et que la femme ne poursuivrait point son mari en séparation de corps et de biens, et ne réclamerait point les droits lui résultant du mariage, et notamment sa part de communauté est nulle; le mari, poursuivi en séparation de corps et de biens, peut réclamer du beau-père les biens mobiliers qu'il lui avait abandonnés lors de l'arrangement à la condition que sa femme ne le poursuivrait point; mais dans ce cas, le beau-père peut lui

opposer en compensation la valeur de la pension et entretien de la femme.—*Décary v. Pominville, Pagnuelo, J., 29 nov. 1889.*

Review of Judgment—Examination of Defendants.

Held:—That where it appears to the Court sitting in Review of a judgment of the Superior Court, that the defendants, in the special circumstances of the case, should have been examined on oath in the cause in the Court below, it may reverse the judgment, and order the transmission of the record to the Court below, in order that such examination may take place.—*Miller v. Lepitre, in Review, Doherty, Papineau, Lorranger, JJ., June 12, 1886.*

Illegitimate child—Claim for maintenance—Art. 240, C.C.—Evidence of filiation—Art. 232, C.C.—Commencement of pr. of in writing—Obligation of heirs of parent deceased.

The tutor to a natural child whose reputed father died before the birth of the child, sued the heirs of the deceased for maintenance. The heirs (father and mother, and brothers and sisters of deceased) had received \$1200 in all from the succession. The action was dismissed by the Court below for want of proof, whereupon the Court of Review reversed this judgment, and ordered the examination of the defendants on oath. It was elicited from them that the deceased, shortly before his death, declared himself to be the father of the child, then unborn.

Held:—1. That the admissions of the defendants, showing that the deceased acknowledged the paternity of the child, were equivalent to a commencement of proof in writing, and established the filiation of the child; and this evidence, which was expressly authorized by the previous judgment of the Court of Review, was legal.

2. That although the defendants inherited their respective shares before the birth of the child, the obligation of the father for maintenance (Art. 240, C.C.) devolved upon them as his heirs, and as having accepted his succession.

3. That their obligation in this respect was not joint and several.

* To appear in Montreal Law Reports, 5 S.C.

4. (Mathieu, J., *diss.*) That the obligation to furnish aliment does not extend beyond what the heirs respectively have received from the succession.—*Miller v. Lepitre*, in Review, Jetté, Gill, Mathieu, JJ., May 31, 1889.

Capias—Judicial abandonment—Effect of—Imprisonment.

Held :—That the effect of a judicial abandonment made by a debtor imprisoned under a *capias* is to entitle the debtor to his liberation; and where the abandonment, on the contestation thereof by the plaintiff, is declared fraudulent and insufficient, the Court has no power under the existing law, after the debtor has undergone the term of imprisonment not exceeding one year, to which he may be condemned under Art. 776, C.C.P., to sanction his further detention under the *capias* until he discloses assets alleged to have been fraudulently secreted.—*Opilvie v. Fernan*, in Review, Johnson, Gill, Würtele, JJ., Oct. 31, 1889.

Fraud and deception—Land and loan company—Purchase of speculative claim.

Held :—1. Where a signature to a covenant of sale was obtained by fraud and misrepresentation, by pretending that a condition previously objected to by the party signing had been removed from the agreement, that the agent who procured the signature was not entitled to recover the commission stipulated in such agreement.

2. That a company incorporated as a land and loan company cannot lawfully purchase or deal in claims of the above nature.—*Land & Loan Co. v. Fraser*, Davidson, J., Dec. 19, 1889.

Contract—No term fixed—Default.

Held :—Where a contract of hire of grain bags, for a voyage, did not fix the time when the bags should be returned, but stipulated only that bags not returned should be paid for at a fixed rate; that the lender was bound to put the party hiring the bags in default to return them, before he could sue for the price; and that a tender of the bags was a good defence to the action.—*American Bag Leasing Co. v. Steidleman*, Davidson, J., Oct. 30, 1889.

Witness—Religious belief—Art. 259, C.C.P.

The testimony of a witness who declares that he does not know whether there is a state of rewards and punishments after death, is inadmissible, (Art. 259, C.C.P.)—*Schuersenski v. Vineberg*, Tait, J., Nov. 16, '88.

Privilege—Attorney's Costs—Art. 1994, C.C.

Held, That the only privilege which exists in respect to counsel fees and attorney's costs is the one which relates to costs and expenses incurred in the interest of the mass of the creditors, either to enable them generally to obtain payment of their claims, or for the preservation of their common pledge; and that costs incurred in the exclusive interest of one individual, and with the object of withdrawing certain revenues of this person from the reach of his creditors, are not entitled to the privilege created by Arts. 1994-1996, C.C.—*Barnard v. Molson*, Würtele, J., May 13, 1889.

THE NEW CHIEF JUSTICE.

A large number of the members of the Bar assembled in the Superior Court, No. 1, on Saturday, Jan. 25, when the formal installation of the Hon. F. G. Johnson as Chief Justice of the Superior Court, took place. All the Montreal Judges were present, with the exception of Justices Gill and Pagnuelo, who were absent through illness. There were also four Judges from the other districts, the Bench being occupied by the Hon. Chief Justice, and Justices Doherty, Bélanger, Jetté, Mathieu, Loranger, Ouimet, Würtele, Tait, Davidson, Tellier and de Lorimier.

The Commission having been read by Mr. John Sleep Honey, clerk of the Court of Review, Mr. N. W. Trenholme, Q. C., *Bâtonnier* of the Bar, rose and addressed the Chief Justice on behalf of the Bar. He said:—"Mr. CHIEF JUSTICE, the honorable duty devolves upon me of conveying to you on this auspicious occasion the congratulations of the Bar of Montreal on your well merited advancement to the high office of Chief Justice of the Superior Court for this ancient Province of Quebec. In doing this, I may say, that I speak not only for those members of the Bar whose mother tongue is English, but also for

my brethren the French-speaking members, whose congratulations will moreover be conveyed to you by an eminent representative of their number. We are all agreed that the important position to which you have been called is one for which you are eminently fitted, and to which you are entitled by your long services, your talents, and the qualifications you possess. To rare natural talents, you have added a mastery of the two great languages of our law in all their strength and beauty, and in their literature, culture and jurisprudence.

"An occasion such as the present appears to me to be a fitting one for us of the Bar to recall to mind, without stopping to dilate thereon, the grand two-fold heritage we in this Province possess in our judicial system on the one hand and in the body of our civil laws on the other. Our judicial system under which you hold your commission is a part of the British constitution. We have just heard your commission read. To be able to write that commission cost our ancestors a long and arduous struggle. That commission is in effect the same as the commission under which a Judge is appointed in Westminster Hall or wherever the British system of an independent judiciary exists, and renders the Judge here as there more independent than the Sovereign.

"I say we should appreciate that grand judicial system, which gives to British Judges everywhere such independence in the administration of the law. It is the highest product of England's civilization, and has done more to make her name respected throughout the world than perhaps anything else. Wherever that system is seen in faithful operation, there are protection to life and property, and hope and ground work for future advancement; but wherever that system is wanting, and one of a dependent or elective judiciary prevails, as unfortunately in some instances in the neighboring country, we see what discredit even a few vicious examples can bring on the institutions of a country; and this I say without disparaging generally the administration of justice in that country, which, as we all know, is one of great lawyers and judges, and where law is, on the whole, well administered.

"But in addition to this inestimable system of an independent judiciary, where is the judiciary that is called upon to administer a nobler code of laws than that which governs in this Province? We have the noble system of which Pothier was and still is the great expounder with the best positions of English law; and we lawyers believe that the laws of this Province are destined to play no insignificant part in the future code for our Dominion engaged as it is in laying the foundations of civil institutions over half a continent.

"I wish we could forget our little differences and rise to a proper appreciation of the great advantages we possess. I may say for the Bar of Montreal, that with all our shortcomings and defects there exists among them a spirit of genuine liberality. As to our shortcomings in not so efficiently aiding the Bench as we ought to have done, the occasion is also perhaps a fitting one for us to express repentance for the past, and promise amends and more zealous co-operation in the future. Since the long vacation, under the few but valuable amendments to our procedure, and the new rules for the conduct of business adopted by the Honorable Judges, much advance has been made, and the result has been most beneficial. We cannot, however, I regret, make the same boast of our Code of Procedure that we can of our Civil Law, but I hope that the improvement that has taken place is but one of many that will follow under your chief justiceship.

"It only remains for me to express to you the wishes of the Bar, that you may long and worthily fill in health and vigor the high and honorable position to which Her Majesty has been pleased to call you."

At the conclusion of the *Bdtonnier's* address, Mr. J. J. Day, Q.C., a member of the Montreal Bar since 1834, begged leave to observe that nothing could give him greater pleasure than to be present on such an occasion as this, and to add his testimony, as he was proud to be able to do, to all that had fallen from the lips of the *Bdtonnier* as to the eminent fitness of the appointment of their present Chief Justice, whose career from its very commencement he had watched with interest and approbation.

There was now a call for Mr. C. A. Geoffrion, Q. C., ex-Bâtonnier, who spoke as follows : —

"Monsieur le Juge en Chief, je répons volontiers à l'appel qu'on me fait d'ajouter quelques observations à l'adresse de félicitations que vient de vous présenter notre bâtonnier.

"En langage du palais je pourrais plaider *short notice*, mais je renonce à toute exception préliminaire ; ce sera mon excuse pour exprimer si mal ce que tout le monde pense si unanimement.

"En effet, M. le Juge en Chef, les murs de cette salle sont aujourd'hui témoins pour la première fois d'un véritable phénomène au barreau ; ils renferment dans leur enceinte cent avocats, et même plus, de même opinion et d'accord sur la même question : chose non moins extraordinaire, onze juges nous voient, nous entendent, et décident à l'unanimité que nous avons raison.

"Juges et avocats s'unissent donc pour vous dire que vous méritiez la haute dignité dont vous venez d'être honoré : non seulement que vous méritiez cet honneur, mais que vous en étiez le plus digne par votre âge, vos connaissances et vos aptitudes spéciales ; les avocats dont la langue maternelle est le français, se plaisent surtout à reconnaître dans votre nomination un hommage à celui qui s'est toujours distingué comme l'un des plus éloquents orateurs dans les deux langues qui se disputent la palme à notre barreau canadien.

"J'ai fait allusion à votre âge, mais je vous prie de ne pas en être blessé : il est bien vrai que les anciens au barreau prétendent que déjà vous étiez à vous y distinguer par vos talents lorsqu'ils y sont arrivés. Nous aurions douté de l'exactitude de leur mémoire, si nos archives ne leur avaient donné raison ; mais quelque soit le nombre des années que compte votre carrière, personne n'a jamais prétendu que vous étiez vieux. Il existe même une conviction bien arrêtée au barreau, c'est que vous ne vieillirez jamais, et que vous continuerez encore bien longtemps à orner le banc par vos talents et vos vertus."

The CHIEF JUSTICE then said : —

"Mr. Bâtonnier and gentlemen of the Bar, if anything could have been wanting to add

to the profound feeling of gratification I ought at this moment to feel, it has been more than amply supplied by the kind observations of my venerable and much valued friend, Mr. Day, whose long career of probity and success in his profession adds to the value of his kind approbation, and whose surviving testimony after the long years we have known each other takes me back to old days never to return, nor ever to be even remembered without emotion. Mr. Bâtonnier and gentlemen, for your kind words of congratulation I must endeavor to express my thanks as best I may, though I can hardly trust myself to say all I should wish as to the personal feelings inseparable from this occasion, and from the long train of thoughts of bygone days which it evokes in my breast. I take it, however, that those kind and encouraging words of yours address themselves not so much to myself as to my office ; and in the capacity in which I feel they are addressed to me, it would be strange indeed if I had not something to say, something to recall, something to re-awaken the past, and to tell of what used to be before some of you were born ; what things I have seen within these walls in the long ago ; what faces, what voices I remember that will never be seen or heard again—what examples still survive, and what things still live that may give us light to live by now in the present. With more than the number of years commonly allotted to man stretching away behind me, of which time half a century has been passed in the profession of the law, and half of that time again on the Bench, I have something to remember, though it may not be so easy to tell it as it impresses me ; for if not within these very walls, yet within those of the old Court House which they have replaced, and on this very spot, or very near to it, indeed, I have seen Chief Justices Reid, O'Sullivan, Vallières and Rolland on the Bench—men whose names will surely live in the annals of our profession ; and at the Bar I have heard Buchanan and Walker, and Driscoll, and Meredith, and Drummond, and Lafontaine, and Dorion, and Loranger, and Papin, and many others, some passed into the shadow-land, and one or two still with us, like our venerable friend who has so kindly joined in the chorus of your good

wishes for me to-day. And in the other main district of Quebec in which, in the old time, as you know, one Chief Justice of this Court used to reside, while another sat here, I have seen the great Jonathan Sewell, the very founder of our procedure, whose judgment in the case of *Forbes v. Atkinson* would alone entitle him to the lasting gratitude of lawyers; and I have also seen sitting there his successor, the late Sir James Stuart, one of the most remarkable figures in our history. If I were to go beyond the membership of our own profession, I could recall the names, as it seems to me I still see their faces, of almost every leading man in this country for the last five-and-fifty years.

"It always was to me matter of great regret that in re-casting our judicature system, the historic name of the King's or Queen's Bench, which formerly belonged to the Court exercising our present jurisdiction, had been transferred to the Court of Appeal, which has no original jurisdiction whatever, save in criminal cases. But the historic jurisdiction of the Court of King's Bench is still ours, though the name has been changed. And well do I remember, too, my first young days at the Bar, and the kindness I always received from some of the leaders—Bench and Bar as well, whom I have mentioned. Above all, I remember, and shall never forget the impression made upon me in my early student days by the court-martial sitting in that same old place now replaced by this, and before whom were tried the political prisoners in those dark days which have since expanded into the light of political liberty; and I recall the sadness and the pride with which I acted as translator to that court, for my hand recorded, and my tongue translated every word of the evidence that was given in those cases.

"But though memory entice us with its powerful, sad, and sometimes bitter spell, let us not forget that we are here to-day, and while we live, to act, and to do. It was said by Daniel Webster in one of his speeches that there is but one thing in the world we can neither face nor fly from, and that is the consciousness of duty disregarded. You have been kind enough, Mr. *Bdtonnier*, to mention the somewhat better state of things as re-

gards despatch of business in our Court since the close of the long vacation. As far as that is attributable to the judges, you may rest assured that it is very far from being due to any exclusive exertion of mine. We may also reflect that it is only since the close of last vacation that this Court has had the full complement of judges allowed by law, and every one of them is as anxious as I am, and much more efficient in steady effort to advance the cause of justice in its practical every day administration; and if he will not mind my mentioning his name, I feel that we all owe a debt of gratitude to my honorable and learned brother Jetté for his indefatigable efforts in organizing and promoting our daily practice in these Courts. It ought to be borne in mind also what this Court has to do. The statistics show that we ten judges in Montreal are charged with considerably more than half of all the business in the entire Province, and therefore are called upon to do, though only one-third of the number, more than is required of the other two-thirds. There is no time and no need to descant upon the rights and the duties and the honor of the profession of the law. An upright and independent Bar is as indispensable as a pure and able Bench. Without your co-operation we can do little, with it we can do all that the public have a right to expect. Again I desire to thank you for the great and much-felt kindness of this demonstration, which makes me feel that I have some right to indulge in reasonable satisfaction when I hear such words as have been addressed to me to-day by those who are responsible for what they say and know whereof they speak."

After the applause which greeted these remarks had died away, the Chief Justice stated that after a recess of a few minutes the Court of Review would sit for the hearing of cases.

WOMEN IN PRISON.

Compulsion is the woman convict's drop of bitterness. The complete mortification of that harmless sort of vanity which fills so much of a woman's life makes her durance doubly vile. All her fine feathers are sacrificed ruthlessly. Her hair, which she has apostolic authority for regarding as an orna-

ment, is shorn of its last lock as soon as her cell has been allotted to her; and the face which has gazed with perfect passiveness, almost to rouse a country's admiration, and the tongue that has been mute under the finding of jury and sentence of judge, are raised to plead pathetically with the holders of the scissors, while the corridors sometimes ring again to the piercing cries for a sparing pity as the inexorable shears gather their harvest of curls. But spring returns and the hair renews itself, and the girls grumble that a thoughtless administration provides them with no hairpins. One woman, whose hair continued to be suspiciously resplendent, as of macassar, after weeks of incarceration, was an object of some wonderment, even to the chaplain, until she explained to him in confidence that she allowed her broth to grow cool, and then skimmed off the fat to glitter in her crown of glory. Another girl certainly rouged, and rouge tells effectually on the pallor of prison confinement. Great was the envious indignation of her sisters in servitude against a frivolity so unattainable, but greater still perhaps was the curiosity to discover how the accomplishment of such frivolity could be attained. At length it was discovered that the red threads woven among the blue shirts which she had to sew would, when drawn out and chewed, yield the bloom yearned after by the cheek of beauty. The manner in which nearly every woman finds it possible to disarrange and double one of her underskirts and present the fascinations of a crinolette is so comic that it has been known to wring a smile from the gravest among men—a prison chaplain. And a woman without a looking glass! Only the austere and severest orders of nuns renounce that. And perhaps it is the female prisoner's most oppressive penance, for the relief of which she is even willing to risk the imposition of extra punishment—a task the more, a meal the less. By an accident, which she declares she will regret for a life-time, she has broken a window. The hole is there, sure enough, but where is the detached glass? Days after this it is found concealed in a corner of her cell, and behind a strip of black cloth, her substitute for quicksilver. And all for what? There are

no male hearts to break and few male eyes to see—only those of governor, chaplain and doctor.—*San Francisco Argonaut.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Feb. 1.

Judicial Abandonments.

Jean Adelard Bélanger, Montreal Jan. 27.
Black & Locke, leather commission merchants, Montreal, Jan. 24.
Chs. S. Gagnier, painter, Montreal, Jan. 21.
Charles G. Glass, trader, Montreal, Jan. 18.
Erastus C. Landon and Samuel R. Martin, doing business as The Landon Dry Plate Co., Montreal, Jan. 25.
A. W. Morris & Brother, manufacturers, Montreal, Jan. 22.
A. Paradis & Cie., Quebec, Jan. 29.
Octave Petit, parish of Ste-Gertrude, Jan. 17.

Curators appointed.

Re Auguste d'Anjou, St. Mathieu.—H. A. Bedard, Quebec, curator, Jan. 23.
Re L. A. Dansereau, Montreal.—J. McD. Hains, Montreal, curator, Jan. 30.
Re Dame Mary Ann Barry (Thomas Quinn & Co).—P. E. Emile de Lorimier, Montreal, curator, Jan. 27.
Re Charles G. Glass, Montreal.—W. A. Caldwell, Montreal, curator, Jan. 23.
Re Nap. Lavasseur, Three Rivers.—Kent & Turcotte, Montreal, joint curator, Jan. 23.
Re George White McKee, Coaticook.—W. A. Caldwell, Montreal, curator, Jan. 23.
Re A. W. Morris & Brother.—T. Darling, Montreal, curator, Jan. 29.
Re Zéphirin Vandry, plumber, Quebec.—N. Matte, Quebec, curator, Jan. 29.

Dividends.

Re Hélène Chalifour, Montreal.—First dividend, payable Feb. 25, Kent & Turcotte, Montreal, joint curator.
Re Dame Marie Hermine Roy (Guimond & Co.), St. Raymond.—Third dividend, payable Feb. 25, Kent & Turcotte, Montreal, joint curator.
Re Philias Dubé.—Third dividend, payable Feb. 3, M. Deschenes, Fraserville, curator.
Re L. L. Gailloux, Three Rivers.—First dividend, payable Feb. 25, Kent & Turcotte, Montreal, curator.
Re F. A. Lallemand.—First dividend, payable Feb. 18, A. W. Stevenson, Montreal, curator.
Re J. A. Lavallée, Berthierville.—First dividend, payable Feb. 25, Kent & Turcotte, Montreal, joint curator.

APPOINTMENTS.

V. B. Sicotte, sheriff of the district of St. Hyacinthe, to be recorder of the Recorder's Court of the city of St. Hyacinthe.

SPECIAL TERMS.

Special term of Superior Court for district of Saguenay, from 19 to 24 March. Special term of Circuit Court, for district of Saguenay, from 15 to 17 March; and for County of Charlevoix, at Baie St. Paul, 12 and 18 March.

The Legal News.

VOL. XIII. FEBRUARY 15, 1890. No. 7.

It appears from a letter received, that the Q.C. appointment has fallen so low that it is not considered worth the fee exacted on the commission. A "Q.C." writes us as follows:—"I see in No. 4, of 13 Legal News, an extract from the *Canada Law Journal* about appointments of Queen's Counsel, to the effect that it is an *inexpensive* mode of pleasing etc. Some kind friends got my name included in a list of Q.C.'s published in the *Canada Gazette* about three years ago. At the same time I received a letter or circular (partly written and partly printed) from Mr. Powell, Assistant Secretary of State, informing me of the appointment, and that as soon as I sent to the Government at Ottawa a fee of twenty dollars, my commission would be sent to me, etc. As I thought that *le jeu ne valait pas la chandelle* I never sent the \$20, and therefore never got the commission. I do not consider that I am a Q.C., having declined to pay the required fee to buy that great (?) honor, and I have never put on the silk gown, nor taken my seat at the Q.C. table in Court. You see that it is not altogether an *inexpensive* mode of pleasing etc. I may add that in 1878 the Provincial Government at Quebec sent me (without requiring a fee) a commission as Q.C. But about that time there was a question raised in the Supreme Court as to the legality or constitutionality of these provincial appointments; at all events I never availed myself of this commission." It would be interesting to know how many of the persons similarly honored have not paid for their commissions.

The *Law Journal* (London) referring to the case of *Reg. v. The Justices of Bromley*, says it is an interesting and instructive illustration of the rule of law that the king is not bound by any statute if he be not expressly named to be so bound. A summons had issued to a baker, who was also a postmaster, and had been supplied from the General Post Office

with a scale for the purpose of weighing the Queen's mails. A summons was issued against him as 'a person who uses or has in his possession for use for trade a scale which is false or unjust' under section 25 of the Weights and Measures Act, 1878. The justices issued the summons, but Lord Coleridge and Mr. Justice Mathew had no hesitation in making a rule absolute for a prohibition, on the ground that it was clear that the provisions of the Act were not intended to apply to weights, measures, and scales supplied by the Post Office. In other words, they were the property of the Queen and could not be called in question, and her servants are not 'persons' within the meaning of an Act of Parliament unless expressly named.

QUEBEC ELECTION ACT.

An Act was assented to on the 31st January last to provide for the immediate operation of the Act of this Province, 52 Vict., chap. 4, intitled: "An Act to amend the Quebec Election Act by extending the franchise, and to amend the Municipal Code respecting the preparation of the valuation roll."

The Act passed in the present session contains three sections, which read as follows:—

1. Until the next general valuation roll is prepared in any municipality (city, town, village, parish, township, &c.) any person to whom the electoral franchise is given by paragraphs 3, 4, 5, 6 and 7 of article 173 of the Revised Statutes of the Province of Quebec, as replaced by section 3 of the Act 52 Vict., chap. 4, may, by a simple application to the council of his municipality, and upon proof of his qualification, have his name entered upon the list of electors of his municipality, and any elector of the said municipality may make such application for the inscription of one or more persons so qualified.

Such inscription shall be made by the council, notwithstanding the fact that such persons are not entered on the valuation roll in force in the municipality, and within the delay and in the same manner as for the ordinary revision of the list of electors of the municipality, and the provisions of law governing the appeal from the decision of the council with respect to the revision of

the list, apply to the inscription enacted by this Act.

2. Section 177 of the said Revised Statutes as replaced by section 4 of the Act 52 Vict., chap. 4 is amended by adding the following words to the second paragraph :

"But for the current year, in the counties of Gaspé and Bonaventure, the list shall be made from the first of April, to the thirty-first of May inclusively."

3. This Act shall come into force on the day of its sanction.

COUR SUPÉRIEURE.

MALBAIE (district de Saguenay),
fév. 1888.

Coram CIMON, J.

DUBERGER v. ANGERS.

Honoraires des avocats dans les causes à la Cour Supérieure de \$200 et au-dessous.

JUGÉ :—*Que, dans les districts autres que Québec et Montréal, les avocats ont droit, pour les actions qui étaient ci-devant de la juridiction de la Cour de Circuit appelable et qui sont maintenant prises à la Cour Supérieure, aux honoraires des actions de la seconde classe à la Cour Supérieure ; et il en était de même pour le protonotaire, qui, avant l'ordre-en-conseil du 9 mars 1888, avait droit à l'honoraire accordé par le tarif du protonotaire ; que l'ordre des juges de décembre 1868 modifiant le tarif des avocats pratiquant en Cour Supérieure sur ce sujet quant aux districts de Québec et de Montréal, n'a pas été promulgué dans les autres districts et n'y est pas en force.*

La question soumise à la Cour, était de savoir si, dans les causes prises en Cour Supérieure, au chef-lieu des districts ruraux, et qui étaient ci-devant du ressort de la Cour de Circuit appelable, les protonotaires et les avocats ont droit aux honoraires accordés par le tarif de la Cour Supérieure, ou à ceux accordés par le tarif de la Cour de Circuit.

En prononçant le jugement, CIMON, J., s'est exprimé comme suit :

Notre Code de Procédure, qui est devenu loi le 28 juin 1867, dit, à l'art. 28, que "la Cour Supérieure connaît en première instance de toute demande ou action qui n'est

"pas exclusivement de la juridiction de la Cour de Circuit ou de l'Amirauté." C'était la disposition des sects. 2 et 3 du chap. 78, S. R. B. C. (en force 31 janvier 1861). Les articles 1053 et 1054 (tels qu'ils se lisaient originairement) définissaient la juridiction de la Cour de Circuit. L'art. 1053 disait que la Cour de Circuit connaît *en dernier ressort et privativement à la Cour Supérieure*, de toute demande dans laquelle la somme ou la valeur de la chose réclamée est moindre que \$100, et des demandes pour certaines taxes ; et l'art. 1054 ajoutait :

"La Cour de Circuit connaît *en première instance et privativement à la Cour Supérieure*, mais sauf appel ;

"1. De toute demande dans laquelle la somme ou valeur de la chose réclamée est de cent piastres ou plus, etc."

Ces deux articles sont la reproduction des sec. 1 et 2 du chap. 79 et de la sec. 39, ch. 77, S. R. B. C.

Or lorsque le Code de Procédure est devenu loi, les tarifs des honoraires des protonotaires de la Cour Supérieure et des greffiers de la Cour de Circuit étaient ceux faits par ordres en conseil du 9 mars 1861, en vertu du chap. 93 S. R. B. C. Il y avait deux tarifs distincts, l'un des honoraires à être payés aux protonotaires de la Cour Supérieure, et l'autre des honoraires payables aux greffiers de la Cour de Circuit. Puis, par l'art. 29 du Code de Procédure, il a été décrété :

"Le gouverneur en conseil peut faire, modifier, révoquer ou amender les tarifs d'honoraires payables aux protonotaires, greffiers, shérifs, coronaires et crieurs, conformément aux dispositions du chap. 93, S. R. B. C." Mais les tarifs du 9 mars 1861, avec quelques amendements faits le 10 avril et le 28 décembre 1869, sont restés en vigueur, comme nous le verrons tantôt, jusqu'en 1879.

Quant aux honoraires des avocats, le même article 29 du Code de Procédure décrétait :

"Les juges de la Cour Supérieure, ou dix au moins d'entre eux, peuvent aussi faire tout tarif d'honoraires pour les conseils, avocats et procureurs, commissaires-enquêteurs et autres officiers nommés par la Cour Supérieure, dont le salaire n'est pas fixé par le gouverneur en conseil ; et tous tels tarifs

"sont promulgués en la manière prescrite "par les règles de pratique."

Cette promulgation consiste dans l'enregistrement, par le protonotaire, dans le registre du tribunal, d'une copie authentique du tarif qui doit lui être transmise; et ce n'est que du moment de cet enregistrement que le tarif prend effet dans le district (C. de Proc., art. 29).

En vertu de cet art. 29, les juges de la Cour Supérieure ont, le 30 décembre 1868, fait deux tarifs distincts d'honoraires pour les avocats, l'un s'appliquant aux affaires de la Cour Supérieure, et l'autre à celles devant la Cour de Circuit. Le tarif de la Cour Supérieure ordonne:

"That the following fees be allowed to the "counsel, advocates and attorneys practising "in the Superior Court in actions to be instituted...;"

Et il divise, à cette fin, les actions, devant la Cour Supérieure, en deux classes:

1re classe. "*Personal actions when the value in "contest exceeds \$400,*" ainsi que les actions réelles ou mixtes, en séparation de corps etc.

2me classe. "*Personal actions when value in "contest does not exceed \$400.*"

Ainsi, toute action prise en Cour Supérieure, lorsque le montant excède \$400, donne à l'avocat droit à l'honoraire de la première classe; et toute action, dont le montant n'excède pas \$400, lui donne droit à l'honoraire de la deuxième classe.

Quant au tarif de la Cour de Circuit, il ordonnait:

"That the following fees be allowed to the "counsel, advocates and attorneys practising "in the Circuit Court, in actions to be instituted...;"

Et, pour cette fin, il divise les causes de la Cour de Circuit en deux grandes classes: 1o. les causes d'un montant au-dessus de \$60; 2o. celles d'un montant de \$60 et au-dessous. Chacune de ces deux grandes classes est elle-même subdivisée. Ainsi, la première distingue les causes d'un montant au-dessus de \$100,—qui étaient, évidemment, celles mentionnées en l'art. 1054 du C. Proc. et dont on pouvait appeler—de celles de \$60 à aller à \$100. Les causes de \$60 et au-dessous sont subdivisées en trois différentes classes.

Telle était la loi, lorsqu'en 1870, la législa-

ture de Québec a adopté l'acte intitulé: "*Acte "pour amender certains articles du Code de Procédure Civile, en ce qui concerne la manière de "procéder devant les Cours Supérieure et de Circuit,*" qui est le chap. 4 de la 35 Vict.; et la section 9 décrète comme suit:

"L'article 1054 du Code est par le présent "amendé en insérant au commencement du "dit article les mots: *Excepté dans les districts "de Québec et de Montréal.*"

L'effet de cet amendement était de restreindre, dans ces deux districts, la juridiction de la Cour de Circuit, en lui enlevant les causes de \$100 et au-dessus, ou, plutôt, les causes de la Cour de Circuit qu'on désignait comme appelables,—et d'ajouter à la juridiction de la Cour Supérieure en lui transférant toutes ces causes appelables.

Quel devait être l'effet de cet amendement, en ce qui concerne les honoraires que les protonotaires et les avocats, dans ces deux districts, auraient droit d'obtenir pour ces nouvelles causes de la Cour Supérieure? La législature n'en a rien dit, et avec raison, car elle avait confié, quant aux protonotaires, le soin au gouverneur en conseil de régler ces honoraires; et c'étaient les juges de la Cour Supérieure qui étaient chargés de faire et amender le tarif des honoraires des avocats. Une chose certaine, c'est que, par cet amendement, ces causes changeaient de juridiction; elles cessaient d'être régies par les règles de procédure de la Cour de Circuit pour être poursuivies d'après les règles de la procédure de la Cour Supérieure.

Les protonotaires ont leur tarif: tarif des honoraires à être payés aux protonotaires. Les greffiers de la Cour de Circuit ont leur tarif séparément. Du moment que le protonotaire agit comme tel, ce n'est pas au tarif du greffier de la Cour de Circuit qu'il doit référer pour son honoraire, mais au tarif du protonotaire, puisqu'il s'agit d'une procédure de la Cour Supérieure.

Pour l'avocat, c'est la même chose. Il y a le tarif des avocats "*practising in the Superior Court,*" et le tarif des avocats "*practising in the Circuit Court.*" Et maintenant que l'avocat intente son action de \$100 et plus à la Cour Supérieure, il est alors "*practising in the Superior Court,*" et il aura droit à l'honoraire que le tarif de la Cour Supérieure ac-

corde à l'avocat dans les causes de \$400 et au-dessous. C'est ce que, sans doute, pensaient les juges de la Cour Supérieure, puisqu'en décembre 1870, ils ont cru devoir décréter comme modification au tarif des honoraires des avocats "*practising in the Superior Court*" de 1868, ce qui suit :

"It is ordered, in all suits in which the sum or the value of the thing demanded amounts to or exceeds *one hundred dollars*, but does not exceed *two hundred dollars*, to be instituted in the Superior Court, under the statute of the province of Quebec passed in the thirty-fourth year of Her Majesty's reign, intituled: *An Act to amend certain articles of the Code of Civil Procedure respecting the practice of the Superior and Circuit Courts*, the fees to be allowed to the counsel, advocates and attorneys engaged in said suits, and also the bailiff employed therein, shall be the same as according to the tariffs now in force are allowed on actions of the same class in the Circuit Court, which said tariffs in the particulars aforesaid are hereby adopted and made tariffs of the Superior Court applicable to the cases aforesaid."

Cet ordre des juges a été enregistré dans le registre du tribunal à Québec et à Montréal. Il ne pouvait alors concerner que ces deux districts.

De son côté, le lieutenant-gouverneur en conseil a, le 1^{er} février 1871, décrété :

Ordre en conseil du 1^{er} février 1871 : "Attendu que par un Acte de la dernière session de la législature de cette province, intitulé : "*Acte pour amender certains articles du Code de Procédure Civile, en ce qui concerne la manière de procéder devant les Cours Supérieure et de Circuit*," les demandes au-dessus de \$100 dans les districts de Québec et de Montréal ont été enlevées de la juridiction de la Cour de Circuit et transférées à la Cour Supérieure, et que les différents tarifs d'honoraires payables aux protonotaires de la Cour Supérieure dans les dits districts sur les procédures et choses faites sur les demandes susdites, et les taxes et droits payables sur les dites procédures en vertu d'ordres en conseil maintenant en vigueur, se trouvent à présent applicables à toutes telles demandes, et qu'il est à propos de modifier les tarifs et les taxes et

"droits susdits de manière à ne pas augmenter les frais dans ces affaires.

"Il est ordonné que les différents tarifs d'honoraires faits et promulgués par autorité, pour les cas et demandes susceptibles d'appel, ci-devant sous la juridiction de la Cour de Circuit, soient à l'avenir les tarifs d'honoraires payables aux protonotaires des districts de Québec et de Montréal respectivement, sur les procédures et choses ainsi transférées à la juridiction de la Cour Supérieure, et que les droits et taxes payables en vertu d'ordres en conseil maintenant en vigueur dûment promulgués sur les dites procédures et choses dans les cas et demandes susceptibles d'appel ci-devant sous la juridiction de la Cour de Circuit, soient à l'avenir les droits et taxes payables sur les dites procédures et choses dans la Cour Supérieure pour les districts de Québec et de Montréal." Vide *Gazette Officielle* du 11 février 1871.

Le 20 janvier 1879, le lieutenant-gouverneur en conseil a révoqué les tarifs des protonotaires de la Cour Supérieure et des greffiers de la Cour de Circuit du 9 mars 1861, amendés les 10 avril et 28 décembre 1869, et il a décrété deux nouveaux tarifs distincts l'un de l'autre : un tarif pour les protonotaires, et un autre pour les greffiers. Ce sont ceux qui sont actuellement en force. Celui des protonotaires ordonne "que les honoraires ci-après déterminés soient à l'avenir les honoraires payables aux protonotaires de la Cour Supérieure," et ces honoraires sont répartis en trois classes : 1^{re} classe. Honoraires à être payés aux protonotaires dans les demandes au-dessus de \$1,000; 2^e classe. Honoraires à être payés dans les demandes au-dessus de \$400 jusqu'à \$1,000; 3^e classe. Honoraires à être payés dans les demandes de \$400 et au-dessous. Le tarif des greffiers de la Cour de Circuit ordonne "que les honoraires ci-après déterminés soient à l'avenir les honoraires payables aux greffiers de la Cour de Circuit," et ce tarif contient deux grandes classes : 1^o les honoraires du greffier dans les causes susceptibles d'appel; 2^o ceux dans les causes non susceptibles d'appel.—Remarquons que ces nouveaux tarifs de 1879 s'appliquent à tous les protonotaires et à tous les greffiers de la province; mais l'ordre en

conseil de 1871 pour les honoraires des protonotaires des districts de Québec et de Montréal dans les causes enlevées à la Cour de Circuit par le statut de 1870, n'a pas été révoqué.

Plus tard, en 1884, par le statut 47 Vict., ch. 8, sec. 9, pour les districts de Trois-Rivières et de Sherbrooke, et en 1885, par le statut 48 Vict., ch. 14, pour les districts de Beauce, Rimouski et Terrebonne, la législature a transféré les causes appelables de la Cour de Circuit à la juridiction de la Cour Supérieure. Et, enfin, en 1886, par le statut 49-50 Vict., ch. 18, la Cour de Circuit *appelable* (comme on l'appellait généralement) a été abolie au chef-lieu de chaque district judiciaire de la province, en sorte qu'à ce chef-lieu, toutes les demandes mentionnées en l'art. 1054 du Code de Procédure se trouvent être de la juridiction de la Cour Supérieure.

Lorsque la législature a décrété tous ces derniers statuts, elle savait comment, au point de vue des honoraires du protonotaire, le lieutenant-gouverneur en conseil avait considéré l'acte de 1870 amendant l'art. 1054 du C. de Proc. pour les districts de Québec et de Montréal, et ce que les juges de la Cour Supérieure en pensaient pour les honoraires des avocats. Cependant la législature rend cet acte de 1870 applicable aux chef-lieux de tous les districts, sans dire un mot des honoraires des protonotaires et des avocats. Elle laisse, comme en 1870, au lieutenant-gouverneur en conseil et aux juges le soin de considérer l'opportunité d'appliquer aux autres districts l'ordre en conseil de 1871, et l'ordre des juges de 1870. Mais cette fois-ci le lieutenant-gouverneur en conseil et les juges ont gardé le silence; et c'est avec raison que les protonotaires (dans les districts autres que ceux de Québec et de Montréal) chargent sur les nouvelles causes mises de la juridiction de la Cour Supérieure l'honoraire qui leur est accordé par le tarif des protonotaires,* et c'est avec raison que les avocats

reclament l'honoraire du tarif de la Cour Supérieure, puisqu'ils sont alors "*practising in the Superior Court*," et que l'ordre des juges de 1870 modifiant le tarif de 1868 n'a pas été promulgué dans ces districts.

En 1886, par l'acte 49-50 Vict., intitulé: "Acte concernant le Barreau de la province de Québec," sec. 96, la législature a enlevé aux juges le pouvoir de faire et modifier les tarifs des honoraires des avocats, en décrétant comme suit:

"96. Le conseil général (du Barreau de la province) peut, de temps à autre, faire des tarifs d'honoraires pour les avocats pratiquant devant toute Cour de justice en cette province. Ces tarifs sont transmis au juge-en-chef de la Cour du Banc de la Reine et à celui de la Cour Supérieure pour être approuvés par eux; et ils n'entrent en vigueur qu'avec l'approbation du lieutenant-gouverneur en conseil."

Eh! bien, le conseil général du Barreau n'a encore rien fait d'officiel, sur le sujet qui nous occupe, qui ait pu recevoir l'approbation du juge-en-chef et du lieutenant-gouverneur.

D'Auteuil, pour le demandeur.

Angers, pour le défendeur.

amendent l'article 1054 du Code de Procédure Civile, les demandes au-dessus de cent piastres au chef-lieu de chaque district judiciaire de la province, ont été enlevées de la juridiction de la Cour de Circuit et transférées à la Cour Supérieure, et attendu que, par suite des dispositions statutaires ci-dessus, le tarif des honoraires des protonotaires de la Cour Supérieure sur les procédures faites sur les dites demandes, et les taxes ou droits payables sur les dites procédures, en vertu des ordres en conseil maintenant en vigueur, sont devenus applicables aux demandes susdites; et qu'il est à propos de modifier le tarif et les ordres en conseil susdits, de manière à ne pas augmenter les frais dans ces affaires.

IL EST ORDONNÉ, que le tarif d'honoraires fait et promulgué par ordre en conseil du 20 janvier, 1879, pour les cas et demandes susceptibles d'appel, ci-devant sous la juridiction de la Cour de Circuit, soit à l'avenir le tarif d'honoraires payables aux protonotaires de la Cour Supérieure, sur les demandes transférées comme susdit à la juridiction de la Cour Supérieure, au chef-lieu de tout district judiciaire de la province, et que les droits ou taxes payables en vertu d'ordres en conseil maintenant en vigueur, sur les procédures dans les dites demandes susceptibles d'appel, ci-devant sous la juridiction de la Cour de Circuit, soient à l'avenir les droits et taxes payables sur les dites procédures dans la Cour Supérieure, au chef-lieu de chaque district judiciaire de la province.

GUSTAVE GRENIER,
Greffier du Conseil Exécutif.

* Depuis que ce jugement a été rendu, le lieutenant-gouverneur en conseil a passé l'ordre suivant:

CHAMBRE DU CONSEIL EXÉCUTIF,
Québec, 9 mars 1888.

Présent:—LE LIEUTENANT-GOUVERNEUR EN CONSEIL.

Attendu que par les Actes 34 Vict., chap. 4,—47 Vict., chap. 8,—48 Vict., chap. 23 et 49-50 Vict., chap. 18, qui

FRENCH LAW AND LAWYERS.

Galignani's *Messenger* (Paris) has the following:

Chief Justice Edward Bermudez, of the Louisiana Supreme Court, who has been spending the summer in Paris, has just left on his way home. He said to one of our representatives the day before he started:

"To one who has some knowledge of French institutions and experience in the forum, it is easy to perceive the distinction of the members of the legal profession in France. As a rule, the lawyers, and, in many instances, even the *avoués*, are men who have enjoyed an early classical education. The former are required to go through a complete course of study of the law such as it is in the codes, on the statute book, and particularly such as it was in the days of the Roman Republic and Empire, and even in Greece. To these French lawyers the institutes of Justinian, the Codex, the Pandects, the Novels, which make up the famous *Corpus Juris Civilis*, are no sealed books.

"The wonderful writings of such eminent lawyers as d'Aguesseau, Montesquieu, Pothier, Merlin, Demolombe, and many others, are real monuments of erudition, which are respected even on the other side of the Atlantic, in Canada, Louisiana, Mexico and South America. The Supreme Court of the United States, though governed by the principles of the English common law, frequently quotes with marked admiration the rules recognized and announced by these illustrious French commentators.

"The French lawyers of the present day are remarkable for their precision in the statements of the facts involved in their cases, for the correctness of their references to laws and authorities, and for the close reasoning and logical sharpness of their arguments. This is doubtless due, in large part, to the fact that the judges on the bench are men of superior knowledge, integrity and experience, who can not and will not be deceived, and who would instantly rebuke and punish garblers; and it is also attributable to the circumstance that in civil cases after the parties have been heard, an attorney-general—there are several—ad-

resses the court on behalf of the state, reviewing the facts, discussing the law impartially, and reaching conclusions which frequently carry the decision.

"It is curious to a common law jurist that, although cases are invariably determined by courts composed of several judges, sometimes of eighteen, as in the chambers of the court of cassation, the opinions of dissenters, if there be any, are never publicly announced, but remain covered by a special official oath of secrecy; so that the judgment is that of the court, including the minority, who must acquiesce in silence.

"When a case has been argued and submitted, the justices retire from their seats, assemble in the same room, forming a circle, and then and there discuss and adjudicate on the issues presented. A conclusion having been reached, the judges return to the bench, and the chief justice, covering himself with his toque, announces the *arrêt* or decree, while the lawyers in the case, who are present, stand up while the decision is being read.

"The presiding judge is the organ of the court and controls its operations. He receives higher pay than his associates; but when we take into account his exalted position and his responsibilities the salary becomes almost insignificant, which is true, by the way, of the judges in many other countries and even in the United States, with its 'surplus.'

"The judges wear the black gown, this being the case even with those of the court of cassation when sitting in the criminal chamber. But judges of the courts of *assize*, which administer criminal justice in the first instance, wear the red gown. The Attorney-General in attendance wears a gown of the color of that worn by the judges of the court before which he practices. Attorneys-General are considered to be magistrates belonging to the magistrature *debout*, or standing magistracy, while the judges who hear and determine cases, compose the magistrature *assise*, or the seated magistracy, or judiciary.

"The French jury consists of twelve men, whose verdict, even in capital cases, need not be unanimous. A bare majority suffices to convict, and the sense of the minority is

never publicly known, as the jurors are not polled. Accused parties have the right to challenge peremptorily nine jurors, and so has the state, but neither, strange to say, may challenge for cause. When the jury happens to be equally divided upon the verdict the accused enjoys the benefit of the doubt, and is entitled to instant discharge. In criminal trials—I do not say this in a spirit of criticism—it is a striking fact that the accused can be, and usually is, constrained to testify, and even to incriminate himself.

“Upon the whole, a consideration of the entire French system forcibly leads the mind to the conclusion that lawyers in this country are, as a rule, men of great learning and ability, the equals of the lawyers of any other nation, and that both criminal and civil justice is administered as impartially and as correctly as human wisdom allows.”

CHARACTERISTICS OF ORATORS.

Shiel would rush to the clerk's desk and pound it.

Mr. Gladstone “pounds the box,” as it is called in England.

Fox used his fist; “It is necessary to pound it into them,” he said.

Burke often lost his temper; Disraeli lost his very rarely; Pitt, never.

Daniel Webster's nerves were like iron. He was cool, calm, collected, under all the circumstances of debate.

Grattan gesticulated so violently that “it was not safe for any member to sit within reach of his right arm.”

Cicero, according to Pliny, began to speak with timidity, and trembled until he struck the earnest current of thought.

Chatham was noted for his distinct articulation. His whisper penetrated everywhere, and his full voice was overwhelming.

Alexander Duffy held his left coat-tail under his left arm, and sometimes bit his finger nails in the midst of an oratorical fight.

Tierney, one of the most ready and fluent debaters of his day, said that he never rose

to speak without feeling his knees knock together.

Charlotte Cushman once said: “I don't know what elocution is. I never studied it. God simply gave me a mouth of peculiar conformation.”

Lord Clarendon's brilliancy was lost in his sluggishness. “A little more rapidity,” some one has said, “and Lord Clarendon might have died prime minister.”

Lord Derby often held a roll of paper in his right hand, which he repeatedly raised and brought down into the palm of his left hand with a resonant whack.

Archbishop Whately wrote an essay on rhetoric, yet he was so inanimate and so inaudible that it was sometimes said “his grace seems to be half asleep when speaking.”

The famous Curran had a sensitiveness in public speaking which often hindered his success. He was painfully affected by any mark of inattention in his audience. If any one slept, or gazed vacantly around the room, his eloquence began to flag, and much of his power was lost.

Lord Derby said that his principal speeches cost him two sleepless nights—one in which he was thinking what to say, and the other in which he was lamenting what he might have said better.

Mirabeau depended very much for oratorical success upon his excessive ugliness. He had the ferocity of a polar bear, and yet, as Mme. de Salliant says, he was but “an empty bugbear.”

When Disraeli rose to speak he took out his handkerchief and shook it in a careless way. More frequently he thrust his hands into the pockets of his coat tails, so as to extend them at an angle.

Wendell Phillips' force was in his self-reliance. He ruled the minds of men by his rhetoric. He was a born agitator—exclusively strong in that, and almost correspondingly weak in controversy.

Chancellor Thurlow made up in physical earnestness for what he lacked in intellectual force. He “rushed like Achilles into the field and dealt destruction around him more by the strength of his arm, the deep tones of voice and the lightning of his eye than by any peculiarity of genius.”—*F. H. Stauffer in the Epoch.*

INSOLVENT NOTICES, ETC.*Quebec Official Gazette, Feb. 8.**Judicial Abandonments.*

Abraham Barré, district of St. Hyacinthe, Feb. 3.
Hormiedas Gariépy (H. Gariépy & Co.), grocer,
Montreal, Feb. 8.

Michel Gauvreau, doing business in name of Giguère
& Co., Quebec, Feb. 4.

Curators appointed.

Re J. B. Barrette, St. Bartholomi.—Kent & Turcotte,
Montreal, joint curator, Feb. 3.

Re Black & Locke, leather commission merchants,
Montreal.—Samuel Coulson, Montreal, curator, Feb. 4.

Re C. S. Gagnier.—C. Desmarteau, Montreal, cura-
tor, Feb. 4.

Re Phidime Guay, Montreal.—Kent & Turcotte,
Montreal, joint curator, Feb. 1.

Re Ferd. Mailhot, trader, St. Jean Deschallons.—
H. A. Bedard, Quebec, curator, Feb. 4.

Re F. N. Martin.—F. Valentine, Three Rivers,
curator, Jan. 31.

Re James H. Merrill, mill-owner, township of Stan-
stead.—J. B. Goodhue, Rock Island, curator, Jan. 31.

Re John Morrisette, trader, St. Charles, Belle-
chasse.—H. A. Bedard, Quebec, curator, Feb. 4.

Re Octave Petit, district of Three Rivers.—P.
Deshaies, Ste. Angèle de Laval, curator, Jan. 31.

Re John A. Rafter & Sons, Montreal.—Kent & Tur-
cotte, Montreal, joint curator, Jan. 31.

Re Geo. W. Thomas.—C. E. Graham, Hull, curator,
Jan. 18.

Dividends.

Re Jos. Gauvreau & Co., St. Jean d'Iberville.—First
and final dividend, payable Feb. 26, C. Desmarteau,
Montreal, trustee.

Re John H. Graham et al.—First and final dividend,
payable Feb. 27, J. N. Fulton, Montreal, curator.

Re Z. Faneuf, St. Hugues.—First and final dividend,
payable Feb. 28, J. Morin, St. Hyacinthe, curator.

Re E. D. Porcheron.—First and final dividend, pay-
able Feb. 27, Chs. Desmarteau, Montreal, curator.

Re C. A. Simard.—First and final dividend, payable
Feb. 22, G. N. Henshaw, St. Hyacinthe, curator.

Re Louis Winestein, Coaticooke.—First and final
dividend, payable Feb. 26, W. A. Caldwell, Montreal,
curator.

Separation as to property.

Louise Bolduc vs. Jean Baptiste Paré, carriage
maker, Montreal, Jan. 31.

Dame Denise Brais vs. Abraham Barré, l'Ange
Gardien, Jan. 30.

Deborah Gardner vs. William Andrew Beattie,
hotel-keeper, Dunham, Feb. 4.

Lucinda Dion vs. Nephthalie A. Parent, trader,
Danville, Jan. 31.

Cadastré.

Notice is given that, in conformity with the provi-
sions of article 2174a C. C. (art. 5846 R. S. P. Q.), No.
2302 and following numbers, to No. 2340, inclusive, of
the cadastre of the parish of Saint Sauveur of Quebec,
have been cancelled, and that the land cadastré
under the said numbers, now forms part of lot No.
2301 of the said cadastre, which number (2301) has
been corrected, in consequence, on the official plan
and book of reference of the said parish.

GENERAL NOTES.

TEACHER AND PUPIL.—The name of Luther Martin
has become historic as that of the most vigorous
adversary of our national constitution, prior to its
adoption, who based his opposition fairly on the solid
ground that it would establish a national autonomy
instead of a federal union. Martin was one of the
most distinguished Southern lawyers of his day. On
a certain occasion he was going to Annapolis in a
stage-coach, when his only travelling companion—a
young lawyer, who had just got his license—said: "Mr.
Martin, you have been wonderfully successful in your
profession. Are you willing to acquaint me with the
secret of your success?" "If you will pay my
expenses during the few days that I shall remain in
Annapolis." "I will," was the earnest response.
"It is in this advice: Deny everything and insist upon
proof." At Annapolis Mr. Martin enjoyed all the
luxuries that a fine hotel could furnish, regardless of
expense, and when the time for his departure arrived,
passed the "bill"—of enormous proportions—to the
young lawyer, who was standing near. The latter
merely glanced at it and returned it to Mr. Martin.
"Aren't you going to pay it?" Mr. Martin asked.
"Pay what?" "This bill. Didn't you promise to
defray my expenses while I was in Annapolis?" "My
dear sir," was the quiet reply, "I deny everything, and
insist upon proof." The eminent lawyer paid his bill,
and said to the young man, "You need no further
counsel from me."—*Washington Law Reporter.*

A CUNIOUS PROTEST.—A woman having been con-
victed of selling liquor, in Charlottetown, P.E.I.
(which is under the Scott Act), and sent to jail in de-
fault of paying the fine, the city council of the capital
of Prince Edward Island has passed the following
resolution:—

"Whereas, woman in all ages, savage and civilised,
has been an object of love, affection and respect; and

"Whereas, a woman in this city has been impris-
oned for a breach of an enactment not supported by
public opinion and contrary to British freedom, justice
and liberty; and

"Whereas, the breach of said enactment consisted
in selling an intoxicating beverage freely used by all
classes, from Her Most Gracious Majesty the Queen,
who is Head of the Church and Defender of the
Faith, to the humblest of her most loyal and most
dutiful subjects; and

"Whereas, the various legislatures in the British
dominions, exercising authority delegated to them
from the people, legalize the importation and manu-
facture of such intoxicating beverages by imposing
thereon a specific charge;

"Therefore resolved, That in the opinion of this
council, imprisonment of a woman for a breach of an
enactment destructive of individual liberty, opposed
to the spirit of the age, and denounced by theologians
and moralists of the highest standing, is an act worthy
of the days of the Star Chamber and Jeffreys."

THE YOUNGEST CHIEF JUSTICE.—Guy C. H. Corliss,
the new Chief Justice of North Dakota, who is only
thirty-one years old, is the youngest judge of that
grade in the United States.

The Legal News.

VOL. XIII. FEBRUARY 22, 1890. No. 8.

The B. A. Bill this year secured more powerful support, and has passed both branches of the Legislature. The leaders of both political parties concurred in recommending the bill. The fear which some would appear to entertain that this measure would introduce unqualified persons into the profession, has been shown to be chimerical, and experience will probably demonstrate that the proposed change of the law is not only in the interest of the Universities but of the Bar as well.

The clear and succinct statement of the law applicable to tariffs of fees, by Mr. Justice Cimon in the case of *Duburger v. Angers*, ante p. 50, directs attention to the duty now imposed on the General Council of the Bar to regulate the tariff (R. S. Q. 3599), and to an omission to provide for attorneys' fees in cases in the Superior Court of \$200 and under, in districts other than Quebec and Montreal. The result is that the fees are taxable on a higher scale in the country districts than in the two districts named.

The notice in the Advocates' Library, not to speak loud, should probably be altered to an injunction not to speak at all. Study and reflection are not aided by the buzz of two or three conversations proceeding simultaneously in different parts of the chamber. While we were in the library of Osgoode Hall a few days ago, we noticed that silence prevailed, though a good many persons were present. We cannot say whether it is always so; but nothing but lack of accommodation elsewhere can excuse the introduction of business conversation into a library.

The celebration of the centenary of the U. S. Supreme Court appears to have had as much success as celebrations of this kind usually attain. Never before, perhaps, was there such a congregation of eminent judicial

dignitaries, and it is fortunate that no crank disappointed in litigation conceived the idea of extinguishing so much light and learning by some fell design against the judiciary. The President was kept away by the great affliction in the family of Secretary Tracy. Reference was made to the fact that on the same day, a century ago, the Supreme Court had adjourned for want of business. Now the Court has business waiting, sufficient to occupy four years.

SUPREME COURT OF CANADA.

OTTAWA, January, 1890.

Quebec.]

ONTARIO & QUEBEC RAILWAY CO. v. MARCHÉ-THERRÉ.

Application to give security for costs—Supreme and Exchequer Courts Act, Sec. 48—Appeal—Jurisdiction—Interlocutory judgment—Final judgment—Art. 1116, C. C. P.—Amount in controversy not determined—Supreme and Exchequer Courts Act, Secs. 28, 29.

STRONG, J. (in Chambers) *dubitante* as to the jurisdiction of the Supreme Court to hear an appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), and desiring to give the parties an opportunity of having the question of jurisdiction decided by the full Court, granted an application to allow the payment of \$500 into Court as security for the costs of the appeal, as the time for appealing from the said judgment would elapse before the next sittings of the Court.

On a motion to quash for want of jurisdiction, before the full Court, it was

Held—1. That a judgment of the Court of Queen's Bench for Lower Canada (appeal side), quashing a writ of appeal on the ground that the writ of appeal had been issued contrary to the provisions of Art. 1116 C. C. P., is not "a final judgment" within the meaning of section 28 of the Supreme and Exchequer Courts Act. (*Shaw v. St. Louis*, 8 Can. S. C. R. 387, distinguished).

2. Per Ritchie, C.J., and Strong, Taschereau and Patterson, J.J., that the Court has no jurisdiction where the amount in contro-

versy, upon an appeal by the defendant, has not been established by the judgment appealed from. Supreme and Exchequer Courts Act, sec. 29.

Appeal quashed with costs.

F. X. Archambault, Q.C., for respondent.

H. Abbott, Q.C., *contra*.

COURT OF QUEEN'S BENCH—MONTREAL.*

Voiturier—Responsabilité—Dommages—Preuve.

Jugé:—10. Qu'un voiturier est responsable des avaries et dommages que souffrent les marchandises confiées à ses soins, lorsqu'il ne peut prouver qu'ils sont imputables à force majeure;

20. Que la preuve de la force majeure et celle du vice de la chose même, si le voiturier l'invoque, incombe à ce dernier;

30. Qu'un voiturier qui fait un contrat pour transporter des marchandises à un endroit éloigné, et qui en reçoit le prix, est responsable de ces marchandises jusqu'au lieu de leur destination, nonobstant qu'à moitié chemin, il aurait délivré ces effets à un autre voiturier pour les rendre au lieu convenu, du consentement du propriétaire.—*Ouimet & The Canadian Express Co.*, Tessier, Cross, Church, Doherty, JJ., (Church, J., *diss.*), 19 janvier 1889.

Uncertain bounds—Claim for trees cut—Evidence.

Where persons are occupying lands which have never been marked off by a regular survey, and one of them, instead of bringing an action *en bornage* to settle the limits of his property, sues a neighbour for the value of trees alleged to have been cut by him upon plaintiff's land, it is incumbent on the plaintiff to make it clear by positive testimony that the trees were in fact cut upon his land; and if, upon the reports of surveyors, uncertainty exists as to the limits of the respective properties, the doubt must be interpreted against the plaintiff. In the present case, moreover, the weight of evidence was in favor of the defendant.—*Milliken & Bourget*,

* To appear in Montreal Law Reports, 5 Q. B.

Dorion, Ch. J., Tessier, Cross, Bossé, Doherty JJ., January 19, 1889.

Tutor and minor—Release and discharge by minor on attaining age of majority—Prescription—C. C. 2258.

Held:—Where a minor on attaining the age of majority, gives her tutrix a release and discharge from all claims arising from her administration as tutrix, that the action of the minor for an account of the tutorship, is prescribed by the lapse of ten years from the date of such discharge; and this rule was held to apply where the discharge was not given immediately and expressly to the tutrix, but to the trustees in whom the estate had been vested by the tutrix on her second marriage, the minor (then of age), however, declaring that she had received her share, and that she discharged the trustees and all others from all further accountability, and in a letter to the tutrix, fifteen years afterwards, expressly disclaimed any intention of disturbing the settlement.—*Watt et al. & Fraser*, Dorion, Ch. J., Tessier, Cross, Baby, Bossé, JJ., November 27, 1889.

Election law—38 Vict. (Q.) s. 266 (R. S. Q. § 425)—Promissory note—Promise referring to an election fund.

The respondent made his promissory note payable to his own order, and endorsed and delivered the same to appellants, who got it discounted; and the proceeds were applied to an election fund of which the respondent was treasurer, the fund being used in promoting the election of members of the provincial legislative assembly. There was an understanding that the appellants would take up the note at maturity, as their contribution to the election fund. The appellants having failed to take up the note, it was paid by respondent. In an action by the latter against appellants:

Held:—That the respondent had no right to recover the amount of the note from the appellants, a promise or undertaking in any way referring to an election fund being void under 38 Vict. (Q.) s. 266, now R. S. Q. § 425.—*St. Louis & Sénécal*, Dorion, Ch. J.,

Tessier, Cross, Baby, Bossé, JJ., September 26, 1889.

Street railway—Collision between tramway car and cart—Negligence of conductor of car—Responsibility of employer.

Held :—(Affirming the decision of the Court of Review, M.L.R., 4 S.C. 193), Where the respondent, a passenger on a street car, while standing on the platform or step of the car, was injured by a passing cart loaded with planks, that as the immediate cause of the accident was the conductor's want of vigilance in failing to stop the car (as he might have done) in time to avoid the collision, the appellants, his employers, were responsible. The fact that the respondent was standing on the platform at the time of the accident did not relieve the appellants from responsibility, inasmuch as the car was crowded, and he was permitted to stand there by the conductor, who had collected fare from him while he was in that position.—*La Cie. de Chemin de Fer Urbain & Wilcam*, Dorion, Ch. J., Cross, Baby, Church, Bossé, JJ., Nov. 23, 1889.

Insurance, Fire—Loss, if any, payable to person named in policy—Conditions of policy—Breach by owner of property—Preliminary proofs of loss.

Held :—(Cross and Doherty, JJ., diss.), following *Black & National Ins. Co.*, 24 L. C. J. 65, that where a policy of insurance against fire, taken out by the owner of real property, declares that the loss, if any, is payable to a person named therein, (without specifying the nature of his interest), such person becomes thereby the party insured, to the extent of his interest, and his right cannot be destroyed or impaired by any act of the owner of the property; (e.g. an assignment of the property insured without notice to the company); and he may make the preliminary proofs of loss in his own behalf. *National Assurance Co. & Harris*, Dorion, Ch. J., Tessier, Cross, Bossé, Doherty, JJ., Jan. 25, 1889.

Donation—Registration—Arts. 806-808 C.C.—Testamentary Executor—Substitution.

Held :—1. That the *don mutuel d'usufruit*, between future consorts, by their contract of

marriage, in favor of the survivor, is subject to registration.

2. A testamentary executor, who has fulfilled the requirements of the will, and has left the movables of a substitution, created thereby, in the possession of the tutor to the institute (a minor), has no action against the tutor, upon the death of the institute within a year and a day from the death of the testator, to revendicate these effects for distribution among the substitutes,—the tutor being bound to account only to the substitutes or to the curator to the substitution.—*Marchessault & Durand*, Dorion, Ch. J., Cross, Church, Bossé, JJ., Nov. 23, 1889.

COUR DE MAGISTRAT.

MONTREAL, 5 juin 1889.

Coram CHAMPAGNE, J. C. M.

LEFAIVRE V. ROY.

Offres réelles—Domage—Cumulation d'actions—Evaluation du domage.

- JUGE :—1o. *Que des offres réelles qui ne sont pas renouvelées avec le plaidoyer ne valent rien ;*
 2o. *Que lorsque le domage a été causé par plusieurs personnes en même temps, le demandeur ne peut prendre une pareille action en domage contre chacun d'eux séparément, mais il doit les poursuivre ensemble pour le montant du domage qu'il a souffert ;*
 3o. *Que celui qui a causé du domage ne peut offrir de mettre les choses endommagées dans le même état qu'avant, mais qu'il doit payer le montant du domage en argent.*

PER CURIAM :—Le petit garçon du défendeur et deux autres petits garçons ont démolé en jouant une petite bâtisse appartenant au demandeur. Les parents de ces enfants, informés de la chose, font offrir au demandeur de rétablir sa bâtisse comme elle était auparavant, ce que le demandeur a refusé, exigeant la valeur du domage en argent. Deux semaines après, le demandeur estimant le domage à \$5 prend trois actions de \$5 chacune contre le père de chacun de ces enfants. Les défendeurs firent motion que les trois causes fussent réunies, et cette motion fut accordée. Ils avaient après la signification de l'action fait estimer le domage à \$2, et les ont offert au demandeur sans frais. L'offre de \$2 au-

rait dû être renouvelée par le plaidoyer, et le demandeur avait le droit d'exiger la valeur du dommage en argent. D'un autre côté, le demandeur n'aurait dû prendre qu'une seule action contre l'un des défendeurs ou contre les trois ensemble, et, dans le cas actuel, le jugement doit être rendu pour 67 centins dans chaque cause, avec frais d'une seule action contre les défendeurs, les deux autres actions sans frais.

Cholette & Cie., avocats du demandeur.

E. L. de Bellefeuille, avocat des défendeurs.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 2 mai 1889.

Coram CHAMPAGNE, J. C. M.

BERNOIT et al. v. BRAUDOIN et al.

Société en commandite—Certificat—Omission du nom d'un des associés—Responsabilité—C. C., arts. 1875, 1876.

Jugé:—1o. *Que le certificat exigé par le C. C. arts. 1875, 1876, pour la formation d'une société en commandite, n'est pas à peine de nullité, et que le fait que le nom d'un des associés n'est pas entré sur le certificat qui a été enregistré, n'est pas une raison valable à opposer à une demande de paiement de la balance de sa mise sociale par les gérants.*

2o. *Que cette omission du nom du défendeur sur le certificat peut le faire considérer par les tiers comme associé en nom collectif.*

PER CURIAM:—Les demandeurs en leur qualité de gérants de la société en commandite sous le nom de la "Compagnie co-opérative de chaussures de Montréal," réclament du défendeur la somme de \$4.60, balance de sa mise sociale pour une action qu'il a prise dans la dite compagnie comme associé commanditaire.

Le défendeur admet avoir pris une action sur laquelle il a payé un à compte, mais il prétend qu'il n'est pas tenu de payer la balance, parce que les demandeurs ne se sont pas conformés aux exigences des articles 1875 et 1876 du Code Civil. Ce certificat n'est pas exigé à peine de nullité; il ne serait pas juste de libérer le défendeur du paiement de sa mise, et de faire peser sur les gérants la responsabilité qui incombe au défendeur pour

une omission dont ce dernier est aussi responsable.

Jugement pour les demandeurs.*

Autorités: C. C. arts. 1871 et seq.; art. 1834; *Dalloz*, V. 40, No. 1258, 1262 à 1272; *Rivière*, Nos. 68, 74, *Loi sur les sociétés*.

David, Demers & Gervais, avocats des demandeurs.

Bergevin & Leclerc, et *M. Leferrière*, avocats du défendeur.

(J. J. B.)

COURT OF APPEALS.

NEW YORK, Dec. 3, 1889.

BENNETT v. BENNETT.†

Marriage—Right of Wife to Sue for Enticing away Husband.

A married woman has at common law a right of action against a person who entices away her husband, and deprives her of his society.

Appeal by defendant from General Term, Fourth Department.

VANN, J. The plaintiff, a married woman, brought this action to recover damages from the defendant for enticing away her husband, and depriving her of his comfort, aid, protection and society. The defendant insists that neither at common law, nor under the Act concerning the rights and liabilities of husband and wife, can such an action be maintained. It was provided by that statute that any married woman might, while married, sue and be sued in all matters having relation to her sole and separate property, and that she might maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole. Laws 1860, chap. 90, p. 158, § 7, as amended by chap. 172, Laws 1862, p. 343. An injury to the person, within the meaning of the law, includes certain acts which do not involve physical contact with the person injured. Thus criminal conversation with the wife has long been held to be a personal injury to the husband. *Delamater v. Russell*, 4 How. Pr. 234 (1850); *Straus v. Schwarzwalden*, 4 Bosw. 627 (1859). And the seduction of a daughter a like injury to the father. *Taylor*

* Jugement fut en même temps rendu par le même juge dans cinq causes semblables.

† *Affirming* 41 Hun. 640, *mem.*

v. *North*, 3 Code Rep. 9 (1850): *Steinberg v. Lasker*, 50 How. Pr. 432. The Code of Civil Procedure, in defining "personal injury," includes under that head, libel, slander, "or other actionable injury to the person." § 3343, subd. 9. It is well settled that a husband can maintain an action against a third person for enticing away his wife, and depriving him of her comfort, aid and society. *Hutcheson v. Peck*, 5 Johns. 196; *Barnes v. Allen*, 1 Abb. Dec. 111. The basis of the action is the loss of *consortium*, or the right of the husband to the conjugal society of his wife. It is not necessary that there should be proof of any pecuniary loss in order to sustain the action. *Hernance v. James*, 32 How. Pr. 142; *Rinehart v. Bills*, 82 Mo. 534. Loss of services is not essential, but is merely matter of aggravation, and need not be alleged or proved. *Bigauette v. Paulel*, 134 Mass. 125. According to the following cases, a wife can maintain an action, in her own name and for her own benefit, against one who entices her husband from her, alienates his affection, and deprives her of his society. *Jaynes v. Jaynes*, 39 Hun, 40; *Bretman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 id. 293; *Warner v. Miller*, 17 id. 221; *Churchill v. Lewis*, id. 226; *Simmons v. Simmons*, 4 N. Y. Supp. 221. There appears to be no reported decision in this State, holding that such an action will not lie, except *Van Arman v. Ayers*, 67 Barb. 544. That case was decided at Special Term, in 1877, and the learned justice who wrote the opinion therein, as a member of the General Term when the case now under consideration was affirmed, concurred in the result, and stated that, owing to recent authorities, he thought the right of action should be upheld. Some of the cases rest mainly upon the statute already alluded to, and sustain the action upon the theory that enticing away the wife is such an injury to the personal rights of the husband as to amount to an injury to the person, while others proceed upon the ground that the loss of *consortium* is an injury to property, in the broad sense of that word, "which includes things not tangible or visible, and applies to whatever is exclusively one's own." *Jaynes v. Jaynes*, *supra*, sustains the action upon either

ground, although prominence is given to the latter. Several of the cases justify the action generally, without allusion to any statute.

If the wrong in question is an injury to property simply, it would not abate upon the death of the plaintiff, but could be revived in the name of the personal representatives, a consequence which suggests the precarious nature of that basis for the action. *Cregin v. Railroad Co.*, 75 N. Y. 192: 83 id. 595. In other States the rule varies. In Ohio and Kansas, recovery by the wife is permitted, while in Indiana the right has thus far been denied, but by a court so evenly divided in opinion as to leave the ultimate rule in that State uncertain. *Clark v. Harlan*, 1 Cin. R. 418; *Westlake v. Westlake*, 34 Ohio St. 621; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Logan v. Logan*, 77 Ind. 558. In England the point does not appear to have been directly passed upon, but in one case the judges approached it so nearly, and differed so widely in their discussions that it is cited as an authority on both sides of the question. *Lynch v. Knight*, 9 H. L. Cas. 577. The lord chancellor (Campbell), in delivering the leading opinion said: "If it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium* or conjugal society can give a cause of action to the husband alone." Lord Cranworth was strongly inclined to think that this view was correct, but did not feel called upon to express a decided opinion, as it was agreed that the judgment of the court should be placed upon another ground. Lords Brougham and Wensleydale thought that the action would not lie. In that case, it is to be observed, the husband joined the wife in bringing the action, "for conformity," as there was no enabling statute authorizing her to sue in her own name.

While this action was tried, decided at the General Term, and argued in this court upon the theory that the Acts of 1860 and 1862, concerning the rights and liabilities of husband and wife, were still in force, in fact they have no application, because the sections heretofore regarded as applicable were

repealed by the General Repealing Act of 1880. Laws 1880, chap. 245, §§ 36, 38.

The judgment in this action, therefore, cannot be affirmed upon the ground that the wrong complained of may be redressed under those statutes. Can it be sustained upon the theory that the right of action belongs to the wife, according to the general principles of the common law, and that she may now maintain it, being permitted to sue in her own name? The Code of Civil Procedure (§ 450) provides: "In an action or special proceeding, a married woman appears, prosecutes or defends, alone or joined with other parties, as if she were single." The capacity of the plaintiff to sue cannot be questioned under this statute, but whether she has a cause of action to sue upon is the important inquiry. Can she maintain an action for any personal injury, even for an assault and battery, since the Repealing Act already cited went into effect? Admitting her power to assert her rights in court, what right has she to assert? Has she such a legal right to the conjugal society of her husband as to enable her to recover against one who wrongfully deprives her of that right?

It is urged that the novelty of the action is a strong argument that it cannot be upheld. The same point was urged in almost the first action brought by a husband against one who had enticed away his wife, and the answer made by the court in that case we repeat as applicable to this: "The first general objection is that there is no precedent of any such action as this, and that therefore it will not lie. . . ." But this general rule is not applicable to the present case. It would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case."

Winsmore v. Greenbank, Willes, 577, 580.

Moreover the absence of strictly common-law precedents is not surprising, because the wife could not bring an action alone, owing to the disability caused by coverture, and the husband would not be apt to sue, as by that act he would confess that he had done wrong in leaving his wife. The actual injury

to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband, and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right, arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy not provided by statute, but springing from the flexibility of the common law, and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society, unless she also has a right of action for the loss of his society? Does not the principle that "the law will never suffer an injury and a damage without a remedy" apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?

It appears from the cases already cited, that according to the weight of authority, the wife can maintain such an action when there is a statute enabling her to sue. The modern elementary writers take the same position. "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the

injured husband or wife. The gist of the action is not the loss of assistance, but the loss of *consortium* of the wife or husband, under which term are usually included the person's affection, society or aid." Bigelow Torts, 153. "We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." Cooley Torts, 228.

The judgment was affirmed, Haight and Parker, JJ., diss.

LEGAL LIFE IN ENGLAND.

The bar is the subject of a recent paper in the *Pall Mall Gazette's* series on professional life in England, and the facts given are interesting. "Of all the professions," says the writer, "probably the bar is the one which presents the most obvious attractions to a young man. As a career it offers great possibilities. But though the prizes of the bar are both numerous and great, there is no walk in life which has so many blanks. Success is well advertised and known to all, but little is heard of those who fail; and the number of failures is out of all proportion to those who attain even a modicum of success.

"A moderate amount of success, it may be noted, is not a common thing. A marked line is drawn between success and failure. The more work a man has at the bar, the more he is likely to get; while the man whose practice is small is always liable to lose what little he has. The tendency is for the work to confine itself to a comparatively small number, and to leave the many idle. While a mere handful of men make very large incomes, very many hundreds at the bar earn practically nothing at all. These disappointed ones struggle on for a while and then drift away in different directions, some to undertake work for which they are more suited; others to live at ease on money which they have inherited; others to find themselves stranded, after having wasted the best years of their lives, without work and without means on which to live. The risks of the bar are very great, and demand very careful consideration by any one inclined to make the bar his profession.

"No one can practice as a barrister until he has been 'called' to the bar, and the first step toward a call is to join one of the Inns of Court. There are four of these inns—the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn. The choice of an inn is a comparatively unimportant matter, as the functions of the inns toward barristers are confined to providing a dining hall and library for the use of their respective members and to letting chambers at high rents to any who are willing to take them. Most of those, however, who intend to devote themselves to common law and circuit work, become members of either the Inner or the Middle Temple, while those who intend to practice on the Chancery side, or to become conveyancing counsel, join Lincoln's Inn. There is, however, no fixed rule in the matter. Several of the leaders of the common law bar, with Sir Charles Russell at their head, are members of Lincoln's Inn, while the ranks of the Templars are swelled by many 'equity draftsmen and conveyancers.'

"The last of the four Inns of Court—Gray's Inn—is a very much smaller society than any of the other three inns, and attracts but few students. The various inns have but few advantages of a solid nature to offer to students. In the way of education for practice at the bar they do practically nothing, and fill a position analogous to that of the city livery companies toward their respective trades. It must not be forgotten, however, that they are all the possessors of very fine libraries, which are open to the use of their members. Probably the library of the Inner Temple, which is the richest of all the inns, is the finest; but all the libraries are good, and kept up to date with new books, legal and otherwise.

"The fees payable on admission are practically the same at each of the Inns of Court, and it will be sufficient to quote the following list as a fair example:

	£	s.	d.
Fee for the admission form.....	1	1	0
Stamps and entrance fees.....	35	6	0
Lecture fee.....	5	5	0
Deposit (returnable, without interest, on call, death, or withdrawal).....	100	0	0
Total.....	£141	12	0

"As a matter of fact, the deposit of £100 is often not demanded from students, for it is not required from members of the Scotch bar, nor from members of any of the universities of Oxford, Cambridge, Dublin, London, Durham, or of the Royal University of Ireland, provided that before call they take a degree or produce a certificate of having kept two years' terms. Before commencing to 'keep terms' at the inn which he may have chosen, the student is required to execute a bond of £50, with two sureties, for payment of 'commons' and dues. The 'commons' are the dinners which the student is required to eat in order that he may keep his term. Three dinners only every term are exacted from university men, while the number for the other students is six. The cost of commons and dues may be estimated at about £8 or £9 a year for three years. When the regulation number of dinners have been consumed, and the terms duly kept, then more fees are payable before call. Approximately these amount to nearly £100. Stamps and fees, £82 10s., commutation for future dues, £12; total, £94 10s. With them, however, the payment of fees ceases, and the full-blown barrister is mulcted no more by his inn.

"The keeping of terms by means of eating of dinners is a survival from the time when the Inns of Court performed some of the functions of a college, and the presence of a student at dinner time was the simplest means of proving residence. A perfect analogy still exists in the various colleges at Oxford and Cambridge, where terms are kept by undergraduates by taking a daily commons of bread and butter out of the college buttery. Now that residence in an Inn of Court has ceased to be necessary, the eating of dinners has become a useless farce, inconvenient to students, and pleasing only to the antiquarian.

[To be continued.]

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Feb. 15.

Judicial Abandonments.

Blumenthal & Rosendal, St. Hyacinthe, Feb. 8.
Arthur E. Desautels, parish of St. Pie, Feb. 8.
Charles J. McGrail, grocer, Montreal, Feb. 8.

Louis Poiré, cabinet-maker, St. Roch de Québec, Feb. 6.

Curators appointed.

Re Joseph Dagenais, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 10.

Re N. Doncet, Grande Pile.—Kent & Turcotte, Montreal, joint curator, Feb. 8.

Re H. Gariépy & Co.—O. Desmarceau, Montreal, curator, Feb. 18.

Re James W. Hannah & Co., Montreal.—J. McD. Hains, Montreal, curator, Feb. 8.

Re Labonté Frère.—Bilodeau & Renaud, Montreal, joint curator, Feb. 11.

Re Isidore Rivet, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 11.

Re Gédéon Sevigny.—W. A. Caldwell, Montreal, curator, Feb. 7.

Re Abraham Simard.—J. A. Quesnel, Arthabaska-ville, curator, Jan. 31.

Re Zoel Turcotte, Pierreville.—Kent & Turcotte, Montreal, joint curator, Feb. 6.

Dividends.

Re J. A. Allard, Hull.—First and final dividend, payable March 6, C. Desmarceau, Montreal, curator.

Re A. Blumenthal & Co., Montreal.—Dividend, payable March 10, Kent & Turcotte, Montreal, joint curator.

Re O. Cartier, fils, grocer, Montreal.—First dividend, payable Feb. 23, Bilodeau & Renaud, Montreal, joint curator.

Re H. Cousineau, Ile Bisard.—Dividend, payable March 4, Kent & Turcotte, Montreal, joint curator.

Re P. C. Dautheil & Co., Quebec.—Dividend, payable March 10, Kent & Turcotte, Montreal, joint curator.

Re Els. Drolet.—Dividend, payable Feb. 24, F. Valentine, Three Rivers, curator.

Re Gouin & Gouin.—First and final dividend, payable March 3, T. E. Normand, Three Rivers, curator.

Re Lamothe & Hervieux.—First and final dividend, payable Feb. 27, O. Poliquin, Quebec, curator.

Re Kelly & Frère, Joliette.—Dividend, payable March 3, Kent & Turcotte, Montreal, joint curator.

Re P. Léonard, Montreal.—First and final dividend, payable March 5, C. Desmarceau, Montreal, curator.

Re Marcotte, Perrault & Co., Montreal.—Second and final dividend, payable March 3, J. McD. Hains, Montreal, curator.

Re Nap. McCready, St. Romuald.—First and final dividend, payable March 3, H. A. Bédard, Quebec, curator.

Separation as to property.

Florianne Chagnon vs. Napoléon Martel, trader, parish of St. Ours, Feb. 4.

Maranda Cocey v. Isaac Patton, farmer, township of Brome, Dec. 27.

Mary Elizabeth Featherston v. James Cunningham, Montreal, Feb. 10.

Emérance Goyette vs. Charles Primeau, Montreal, Feb. 12.

COURT TERMS.

Court of Queen's Bench, criminal term, district of Montmagny, changed to March 25.

The Legal News.

VOL. XIII. MARCH 1, 1890. No. 9.

PRESCRIPTION.

In *Corporation of Sherbrooke & Dufort*, M.L.R., 5 Q.B. 266, the Court of Appeal dismissed the action upon the three months' limitation under C.S.C. ch. 85, s. 3, which was not pleaded, but was invoked on the appeal. Mr. Justice Tessier, who dissented, referred to the case of *Carter & Breakey*, (A. D. 1884) Ramsay, 547, which states that the Court of Appeals modified the judgment, but did not supply the defence of prescription. And it is added, "In the Supreme Court, this judgment was reversed by allowing a higher rate of value for the use and occupation of the land, but the defence of prescription was not supplied." We have reason to believe that this note was based upon inaccurate information, and that the abstract of *Carter & Breakey* in Cassels, 256, is correct. It must be remembered that Mr. Justice Ramsay's Index was an unfinished draft, at the time of his death. If the lamented author had lived to complete the thorough revision which he intended to give the work as it was passing through the press, this and other inaccuracies which may be observed in it, would probably have been rectified.

Mr. Justice Bossé, in giving the judgment of the Court in *Corp. of Sherbrooke & Dufort*, refers to the case of *Lamontagne & Dufresne*, (A.D. 1874), Ramsay, 545. The holding in this case, according to Mr. Justice Ramsay, was as follows:—"Prescription must be pleaded in all the cases mentioned in articles 2250, 2260, 2261, and 2262, C.C., the right of action in these cases not being 'denied.'"

The action in the last mentioned case was brought by Dufresne *et al.* against Lamontagne to resiliate a lease for fifteen years from Laurent Dufresne to the defendant Lamontagne. The action also included a demand for eight and a half years' rent. Prescription was not pleaded, and the judgment of the Superior Court, Torrance, J., July 9, 1873,

makes no reference to it. The demand was maintained, the *considérant* being as follows:

"Considérant que le défendeur Lamontagne a failli de faire la preuve des allégations contenues dans ses exceptions et défenses par lui plaidées à cette action, déboute les dites exceptions et défenses, sauf quant aux primes d'assurance, et condamne le dit défendeur Charles H. Lamontagne à payer aux dits demandeurs la somme de \$524, étant pour dix-sept semestres de loyer des prémisses mentionnées en la déclaration en cette cause, dus et échus le 1er novembre 1871, etc." The lease was also rescinded.

Lamontagne appealed from this judgment, Mr. D. D. Bondy for appellant. The *factum* discusses various questions with great vivacity, and on the last page we find the following reference to the question of prescription:

"Enfin, en se limitant à la prescription qui est le dernier port de refuge de l'appelant, et dans lequel, armé de la loi qu'on ne l'accusera pas, il l'espère, d'avoir forgée, il défie tous les attaques haineuses et impuissantes de ses adversaires ennemis, il ne resterait dû en définitive aux intimés qu'une somme totale de \$354."

Messrs. Duhamel, Rainville & Rinfret represented the respondents, Mr. Joseph Doutre, Q.C., appearing as counsel. The question of prescription is noticed in the respondents' *factum* in the following terms:—

"La prescription de cinq ans, contre les arrérages d'un bail emphytéotique n'existait pas avant la Code. Voir texte officiel de l'art. 2250, qui est inclu entre []. De même, l'art. 2267 est entre []. Et l'art. transitoire 2270 réserve les prescriptions commencées avant le Code; ce qui veut dire que les contrats soumis à des prescriptions différentes de celles créées par le Code, continuent à être régis par le droit antérieur. D'ailleurs, dans le cas actuel, les demandeurs sont créanciers solidaires, et la prescription, interrompue ou suspendue pour l'un d'eux, l'était pour tous. C.C. Art. 2230. L'art. 2232 introductif d'un droit nouveau suspend néanmoins la prescription à l'égard des mineurs. Or ici il y a nombre de mineurs.

"De plus, la prescription (Art. 2188) n'est pas suppléée par le juge. Ici elle n'est pas

plaidée. C'est en appel seulement que cette question est soulevée.

"L'Art. 2287 dit que la prescription est interrompue par la reconnaissance que le débiteur fait du droit de celui contre lequel il prescrivait. Quelle reconnaissance plus positive que celle de celui qui prétend avoir payé?"

The judgment was unanimously affirmed in appeal, Dorion, Ch. J., Monk, Taschereau, Ramsay, Sanborn, JJ., and in Mr. Justice Ramsay's facts we find the following carefully written opinion, which indicates that the question of prescription was fully considered by the Court, this being apparently the only question upon which there was any hesitation in confirming the judgment.

"RAMSAY, J. :—

"Under the Code is it necessary to plead a limitation, and if not pleaded, may it be supplied by the Court?"

"The general rule is, that the defence of prescription cannot be supplied by the Court, but Art. 2188 adds, 'except in cases where the right of action is denied.' It is pretended that under this Article it can and must be supplied by the Court.

"This exception is given as old law, on the authority, it is presumed, of the case of *Pigeon & The Mayor, etc., of Montreal*, 3 L.C.J., p. 294. But that case was decided in appeal on the special enactment which permits the Corporation to raise the question of the limitation of six months under the general issue in all actions for anything done under the Water Works Acts. 7 Vic. cap. 44, sect. 26, extended by the 16 Vic. cap. 127; 19 Vic. cap. 70, and 24 Vict. cap. 67. It is not the law in England. Chitty on Bills, 596; Stephen on Pleading, 154; Chitty on Pleading, 479. Nor was there any such idea under the old French law: 'Les fins de non recevoir doivent être opposées par le débiteur; le Juge ne les supplée pas,' says Pothier, Obl. 676. We have therefore a doctrine laid down in the Code as old law, not only unsupported, but at variance with all authority, and besides it is not in accordance with the general principles of the Articles preceding. Art. 2183 defines the different prescriptions, and indicates the distinction between those prescriptions which are a 'bar to' or 'preclude' any

action. Art. 2184, however, goes on to say that the prescription generally may be renounced, and 2185 says it may be so tacitly or expressly. If, however, we take the interpretation sought to be given to Art. 2188, and which its terms to some extent justify, we must conclude that the short prescriptions cannot be renounced. We must therefore reconcile these articles, and this becomes the easier from the form of Art. 2188. It will be observed that the article does not say absolutely that the Court could supply the defence resulting from prescription where the action is denied; it is only inferentially that we can decide that it was the intention of the legislature to confer this exceptional power on the Court. Pointed as the inference is, I don't think we are obliged so to interpret the Statute under the circumstances.

"Again, the action is not denied in the short prescriptions. Art. 2287 says, 'no action can be maintained.' Those words have never been held to preclude the action. And so an action for any matter provided for by Art. 1235 will not be dismissed on demurrer if the writing signed by the party to be bound be set up.

"This, however, is not the first time since the Code that this point has come up. In the case of *Wilson & Demers, Aylwin and Badgley, JJ.*, declared that the Statute of Limitations could not be put in issue by demurrer, but must be pleaded by an exception. 2 L.C.L.J., page 251."

From the foregoing it would appear that in 1884 the doctrine held by the Court of Appeal was that these prescriptions must be pleaded, and that in 1886, when Mr. Justice Ramsay was compiling his Index, he was under the impression that this doctrine had not been disturbed. In fact, however, it had been disturbed by the decision of the Supreme Court in *Carter & Breakey*; and in another issue we propose to refer more particularly to what was held in this case.

SUPERIOR COURT—MONTREAL.*

Juridiction disciplinaire de la Cour sur les huissiers—Livre de ventes—Achat pour l'huissier par personnes interposées d'effets

* To appear in Montreal Law Reports, 5 S.C.

vendus par lui dans l'exercice de ses fonctions—Absence de procès-verbal de vente—Suspension d'huissier.

Jugé:—1o. Que le défendeur, huissier du district de Montréal, doit se soumettre aux règlements de la demanderesse et tenir un registre des ventes par lui faites;

2o. Que la vente d'un objet par un huissier à son recours, à vil prix, et en l'absence d'enchérisseurs, sera réputée faite à l'huissier lui-même, et que l'huissier pourra être condamné à remettre cet objet à la personne sur qui il l'a vendu;

3o. Que l'huissier sera considéré favoriser ses parents ou employés dans la vente et l'adjudication des effets vendus par lui, s'il est dans l'habitude de leur adjuger aux ventes judiciaires faites par lui.—*La Corporation des Huissiers v. Bourassa*, Pagnuelo, J., 19 nov., 1889.

Certiorari—Cour des Commissaires—Arts. 1206, 1214, 1221, C. P. C.

Jugé:—Que l'opposant à une saisie n'est pas tenu de procéder le jour du rapport de l'opposition à la Cour des Commissaires, et que le renvoi de l'opposition, le jour qu'elle est rapportée, faite par l'opposant de procéder, constitue un excès de pouvoir et donne lieu à l'émanation du *certiorari*.—*Ex parte Sénécal*, requérant *certiorari*, Pagnuelo, J., 14 nov., 1889.

Partage de meubles—Saisie-conservatoire—Compte de tutelle—Union de causes.

Jugé:—1o. Qu'un co-propriétaire par indivis a droit de saisir par voie de saisie-conservatoire des meubles que son co-propriétaire a commencé à vendre, et que le compte de tutelle que le défendeur doit rendre à la demanderesse ne peut empêcher cette dernière de demander le partage des meubles et d'accompagner cette demande de mesures conservatoires;

2o. Que l'union d'une cause avec une autre cause entre les mêmes parties ne peut être accordée lorsqu'elle aurait l'effet de compliquer inutilement la procédure et de retarder l'instruction;

3o. Que le mari peut plaider à cette demande en partage qu'il avait fait don à sa

femme, durant le mariage, des dits meubles par personne interposée, et que cette donation est nulle, et par conséquent ces meubles n'ont pas cessé de lui appartenir.—*Evans et vir v. Evans*, Pagnuelo, J., 12 novembre 1889.

Procedure—Service of Summons.

Held:—That where it is shown that a defendant locks his doors to evade service of a writ of summons, an order will be granted authorizing the bailiff to use force to open them to effect such service, or to serve the writ after seven o'clock p.m.—*McLaren v. McLaren*, Gill, J., April 13, 1889.

Capias—Deposit in lieu of bail under Art. 828, C. C. P.—Agreement to give bail—Conditional obligation—Time of performance—Default—Arts. 1067-1069, C. C.

T., being arrested on a *capias*, gave the bail (Feb. 18, 1888), required by Art. 828, C. C. P., for his provisional discharge, the sureties, by consent, depositing \$200 with the prothonotary in place of a bond, the terms of the written consent being:—"Les parties consentent et acceptent le dépôt... pour payer le montant du jugement à intervenir sur la demande en capital, intérêt et frais, s'il ne donne pas cautions au désir de l'article 824 ou 825, C. P. C., le 1er mars 1888." The contestation of the *capias* was dismissed, Feb. 22, and on March 5, T. gave notice that he would put in bail under art. 824 or 825, and bail was given under art. 825 C. C. P., by permission of the Court, the rights of the parties being reserved. The plaintiff then attached the deposit in the hands of the prothonotary for the costs on the contestation of the *capias*. On an intervention by the sureties, each claiming half of the deposit:

Held, (Tait, J. diss.):—That the date (1st March) mentioned in the consent, applied only to bail under art. 824, C. C. P., which must be given within eight days from the day fixed for the return of the writ; and that T. having the right to put in bail under art. 825, C. C. P., at any time before judgment, the case did not come within art. 1068, C. C.; nor under art. 1069, C. C., which applies to contracts of a commercial nature only. The intervention of the sureties was therefore

maintained.—*Bourassa v. Thibault*, in Review, Johnson, Ch. J., Gill, Tait, JJ., Dec. 31, 1889.

Contract for prolongation and opening of streets
—Breach—Measure of damages.

The municipality of H. (whose obligations were subsequently assumed by defendants), in consideration of the gratuitous cession of land by plaintiff, agreed to prolong a certain street through plaintiff's lots, at a width of 100 feet, and to open two other streets through his property. The street first referred to was afterwards homologated at a width of 60 feet only, and the defendants delayed to complete the other two streets.

Held :—That the measure of damages in respect of the street homologated at a width of 60 feet, was the value of the 40 feet taken by defendants and not retroceded, and the depreciation in value of the rest of plaintiff's property in consequence of the loss of frontage on the street as prolonged. And as to the breach of contract respecting the other two streets, the measure of damages was the interest (computed from the time when the streets could reasonably have been completed) on the capital represented by the increased value which the plaintiff could have got for his lots if the streets had been made as agreed.—*Aylwin v. City of Montreal*, Johnson, J., March 29, 1889.

Prohibition—Circuit Court—Jurisdiction—Art. 1031, C.C.P.

Held :—1. That a writ of prohibition will not lie to the Circuit Court, it not being a Court of inferior jurisdiction within the meaning of Art. 1031, C. C. P.

2. That the Circuit Court having jurisdiction under R. S. Q. 6218 (4), to hear appeals from decisions of local municipal councils respecting valuation rolls, there was no excess of jurisdiction in the circumstances.—*Corporation de la paroisse de Ste. Genevieve de Boileau*, Gill, J., Nov. 21, 1889.

Druggist—Error—Pharmaceutical Act—Label.

The plaintiff claimed damages from a druggist, for an alleged error of his apprentice in giving plaintiff's messenger "carbolic acid," instead of "carbolic oil," which was

asked for. It appeared that carbolic acid was given, but the evidence of the messenger that she asked for carbolic oil was contradicted by that of the apprentice, who testified that carbolic acid was asked for. It also appeared that the bottle was merely labelled 'poison,' instead of being labelled with the name of the substance it contained as required by the Pharmaceutical Act 48 Vict. (Q.) ch. 38, s. 24 (now R. S. Q. 4039).

Held :—That the action being for damages, and not for a penalty under the Pharmaceutical Act, and there being no evidence that the injury complained of resulted from the insufficiency of the label, this circumstance would not justify a judgment against the defendant.—*Singer v. Leonard*, in Review, Johnson, Gill, Würtele, JJ., Oct. 31, 1889.

COUR DE MAGISTRAT.

MONTRÉAL, 12 juin 1889.

Coram CHAMPAGNE, J. C. M.

HAMILTON V. GOVER.

Action sur compte—Serment supplétoire.

Jugé :—Dans une action sur compte pour divers items, le défendeur admettant un des items et niant les autres, lorsque le demandeur a déjà prouvé plusieurs des items niés par le défendeur, que, dans ce cas, il doit être admis à prouver les autres items du compte par ses livres de compte et son serment.

J. D. Cameron, avocat du demandeur.

M. Cooke, avocat du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, mai 1889.

Coram CHAMPAGNE, J. C. M.

GREMORE V. THE CITY PRINTING Co.

Salaire—Compensation—Domages—Ouvriers et patrons.

Jugé :—1o. Que l'ouvrier peut être tenu responsable des dommages causés à son patron dans l'exécution des ouvrages qui lui sont ordonnés de faire, lorsque ces dommages sont causés par sa faute, sa négligence ou par son incompétence : mais pour le rendre ainsi responsable il ne faut pas que ces dom-

mages aient été causés par une cause imputable au patron.

20. *Que lorsqu'il est prouvé que l'instrument fourni au demandeur par la défenderesse était impropre à l'ouvrage en question, et que d'autres ouvriers avaient également travaillé au même ouvrage, le patron n'a pas d'action en dommage.*

L'action était portée par un ouvrier contre son patron pour salaire. La défenderesse plaide que ce qu'elle doit au demandeur est compensée par le dommage que le demandeur lui avait causé en gâtant certains ouvrages à lui confiés.

La preuve établit que divers ouvriers avaient travaillé au même ouvrage que le demandeur, et aussi que les outils et instruments fournis par la défenderesse étaient défectueux.

Jugement pour le demandeur.

Autorités.—C. C. 1053, 1054; *Gagnon v. Gaudry*, M. L. R., 1 S. C. 348; *Dorion v. Dorion*, 5 Leg. News, 130.

McCormick, avocat du demandeur.

Holton, avocat du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 21 juin 1889.

Coram CHAMPAGNE, J. C. M.

LEBLANC v. WHITE.

Locateur—Privilège—Rétention.

Jugé.—*Que le locateur n'a pas le droit de retenir les meubles de son locataire pour garantir le paiement du loyer, à moins de procéder par voie de saisie-gagerie.*

Le demandeur avait d'abord procédé à saisir les meubles du défendeur avec un bref de saisie-gagerie, mais l'huissier saisissant ayant oublié certains effets, le demandeur, accompagné de l'huissier, retourna subseqüemment dans le logement occupé par le défendeur et s'empara des effets non saisis et les enleva, les retenant pour son loyer dû. Le défendeur, demandeur en cette cause, prit alors une saisie-revendication pour rentrer en possession de ces effets, et cette saisie-revendication a été maintenue par la Cour, le loca-

teur ayant un privilège, et non un droit de rétention.

Saisie-revendication maintenue.

Mirault & Beaudet, avocats du demandeur.

Robertson & Cie., avocats du défendeur.

(J. J. B.)

THE LATE MR. JUSTICE MANISTY.

The circumstances of the death of Sir Henry Manisty add one more name to the list of judges who, in the Queen's reign, have received their mortal stroke on the bench while discharging their judicial duties. Of these, Justice Talfourd, who was struck with apoplexy while delivering his charge to the grand jury at Stafford at the spring assizes of 1854, and died after only a few moments had elapsed, was the only judge who actually expired on the bench. Baron Watson, at the spring assizes of 1854, at Welshpool, had just concluded his charge to the grand jury, when he was seized with apoplexy and died very shortly afterwards. Justice Wightman, on December 10, 1863, at the York assizes spent the day in trying a complicated case which lasted the whole day. His summing-up was masterly, and the hall was crowded. When he reached his lodgings he complained to his daughter, who appened to be with him on circuit, of his work overcoming him, but talked cheerfully of resigning and going on the Continent, went to bed, and died next morning. The death of Mr. Justice Manisty resembles most that of Justice Wightman. The learned judge, in the week before last, occupied himself with the work and amusement which forms the life of a judge during the sittings. He had been trying common jury causes all the week, and on Thursday dined in the Middle Temple Hall on Grand Day, when it was a matter of general remark how well he bore his years. He seems to have gone on to Gray's Inn, where he was a master of the bench, with Lord Morris to help entertain the excellent company gathered there. Next day he finished a part heard case, but on the approach of the time for adjourning the Court in the afternoon he was observed not to be taking a note of the evidence, which up to the time of his seizure he had taken, and which, as

we are told on the authority of the Lord Chief Justice, were as clear and his handwriting as delicate and distinct as if he had many years of life before him. He was carried out of Court to his private room, and later in the evening was driven to his house, where he died January 31, seven days after the attack.

The history of the life of Justice Manisty has the not very common feature that he was in turn solicitor, barrister and judge. It has been said that he did not come to the bar through the usual avenues. No doubt, at the time when he was called, it was not usual for an attorney or solicitor to be called to the bar, but in these days a solicitor of five years' standing may be called to the bar, without keeping any terms, upon passing the examination for admission to an Inn of Court. Even this slight barrier can be overcome on the certificate of two members of the council of the Incorporated Law Society that he is a fit and proper person to be called to the bar. The reason why Mr. Manisty, who in 1847 had for twelve years prospered as a solicitor, entered his name as a student at Gray's Inn, it is said, was that he wished as a barrister to win a case which he had lost as a solicitor. Three years afterwards he was called to the bar. As a junior he had a large practice in Westminster Hall and on the Northern Circuit in the class of cases usually called heavy commercial cases. His acuteness in detecting the real points of his case, and his energy in enforcing them, with the store of learning which he had accumulated, brought him success. His fame at this period of his career is commemorated in a song which is still sung on the Northern Circuit, in which all the briefs were said to fall into Manisty's red bag. He rapidly, twelve years afterwards, obtained a silk gown in 1857, and although he did not become the leader of the Northern Circuit, except, perhaps, in the sense that he was senior Queen's Counsel, he held his own on circuit and in Westminster Hall in cases requiring careful treatment of knowledge of the law or a knowledge of the place where to find it, which is almost equally good, and the power of putting the point and driving it home on the bench. As a judge, the most recent case of

importance in which he took a prominent part was the case of *Regina v. The Bishop of London*. In the Divisional Court the Lord Chief Justice had to hold the scales between Baron Pollock and Justice Manisty, the one being in favour of the bishop and the other in favor of the Crown. The weight of the judgment of Justice Manisty was first tested by his delivering it before his brother as junior judge. After pondering for some months, the Lord Chief Justice inclined towards his brother Manisty, and this view of the case was upheld by the Court of Appeal. He tried the case of *Membury v. The Great Western Railway Company*, which is now the highest authority on the application of the maxim 'Volenti non fit injuria.' When he tried the case of *Adams v. Coleridge* in 1884, although he was criticised unjustly, he showed a sturdy independence of public opinion characteristic of himself and not universal in these times. All the cases that came before him were tried with patience and fairness, and in a manner satisfactory, so far as may be, to all parties.

It has been said that he had no humour; but there is a tale told of the judge that some time ago he consulted an eminent physician on the state of his health. When questioned as to his diet, he replied that he drank good part of a bottle of port a day. The physician said, 'That will not do; we must knock off that.' The judge complied for a fortnight, and came back to say that he was no better and rather worse. The physician suggested that perhaps after all the change of habit had done more harm than good, and advised him to return to his usual habit. Whereupon the judge said: 'That is all very well; but how about the arrears?' The physician shook his head at this judicial devotion to clearing his list, but it is not impossible that the second prescription helped the judge to do what is the duty of every good judge—'keep down the arrears.'

—*Law Journal (London)*.

LEGAL LIFE IN ENGLAND.

[Continued from page 64.]

"Before his call to the bar, the student has to pass an examination, the details of which are settled from time to time by a Council of Legal Education, which is nominated by the

four Inns of Court. Roughly speaking, it is divided into two parts—Roman law, in which one paper is set, and English law, which is sub-divided into three branches, with an examination paper for each branch. This examination entails, of course, the reading of a certain number of legal text-books; but its nature is not such as to tax severely the powers of any man of ordinary intelligence, and success in the passing of it by no means implies any profound legal learning.

"The necessary expenses of a call to the bar with a view to practice are by no means confined to the Government stamp duties and the fees payable to an inn. The inns provide nothing in the nature of legal training except a few lectures; and no lectures, however good, can qualify a student for practice. For practice, experience is necessary, and experience can only be gained in the chambers of a practicing barrister. There, and there only, can a knowledge be acquired of what may be called the unseen work of the bar—the advising of clients, the drafting of the 'pleadings' in an action, and the drafting of deeds and other documents. It is very commonly supposed that a barrister's business consists mainly, if not entirely, in arguing cases in court. This is by no means the case with 'juniors,' this is to say, barristers who have not attained the status of a Queen's Counsel. Every junior barrister (except those who devote themselves to criminal work) has a great deal more work to do in his chambers than in court. Many conveyancers rarely or never go into court at all. It may be safely said that a junior barrister's first acquaintance with an action is seldom gathered from his brief. In all probability he has advised on the subject matter of action, has drawn the pleadings, and has been responsible for all the preliminary stages before the actual hearing.

"Thus it is necessary for every student to learn his business in a barrister's chambers, and for the privilege of a seat in a pupil room during a year, and the right to read any papers which may come in, the customary fee is a hundred guineas. Some barristers try to give their pupils some definite tuition, but the busiest men are

those who have most pupils, and the result generally is that the pupils are left to shift for themselves as best they can, and to pick up what knowledge they may. Two years' reading in chambers is usually considered the minimum equipment for practice at the bar, and this implies the disbursement of 200 guineas.

"It is not unusual to read in a solicitor's office as well as in a barrister's chambers, and there can be but little doubt that this is a wise course to pursue. By so doing the ordinary machinery of legal business is learned from the bottom upward, and a solid foundation is laid for the knowledge of law which is to follow. Many who are best qualified to judge have expressed their opinion that the wisest course for the would-be barrister to pursue is to begin his legal career as a solicitor, and only to join the higher branches of the legal profession when of maturer years. However this may be, a course of training in a solicitor's office must always prove of great practical value to a barrister; for there he has an opportunity of learning much that is useful, and much that renders the course of business intelligible, which could only be learned indirectly and with some difficulty in a barrister's chambers. There is no customary fee for a course of reading, as suggested, in a solicitor's office, but the fee to be paid is a matter of arrangement in each particular case. Many young barristers continue reading in a barrister's chambers after they have been called to the bar; but it must be remembered that professional etiquette strictly forbids a barrister from reading in a solicitor's office. Consequently such reading must take place, if at all, before call, and not after.

"The regulation two years' reading in chambers is usually divided between the Temple and Lincoln's Inn—that is to say, half the time is spent in the chambers of a Common Law barrister, and half in the chambers of one who practices on the Chancery side. In the majority of cases that is probably wise; for the young barrister ought to know something about each of the great branches of the law, and ought never to be obliged to refuse any work which may be sent to him. The nature of most men's career

is shaped for them almost accidentally, and the barrister must be ready to seize his opportunities as they arise, or they are quickly gone—perhaps never to return. Some perhaps feel that they have not the power of achieving success except in one particular line, and that an opportunity for distinction offered to them in any other would inevitably be wasted. For instance, one man may have a gift of advocacy without any power of storing up a knowledge of law. Such a one would be most likely to succeed on circuit and at sessions, and for him it would be a mere waste of time to enter any chambers where he would see nothing but the drier work of a Chancery practice. Another, again, may have opposite powers and tastes, and may revel in the drafting of complicated deeds and wills, and the grubbing out of obscure points of law.

"Apart, however, from the question whether the necessary reading in chambers ought to be wholly in the Temple or wholly in Lincoln's Inn, or equally divided between the two, some of a man's chances depend on a good choice with whom to read. If he has many friends who are able to help him when he is called to the bar he will probably be wise in entering the chambers of some barrister in full practice, with whom he can be sure of seeing plenty of work. If, however, he has not a practice of his own assured to him he had better read, for part of his time at least, with some barrister who is not overwhelmed with work, and who is likely to give his pupil work to do for him in the future in the capacity of his 'devil.' In the same way a young barrister who intends to join a particular circuit ought to read with some one who is already in practice on that circuit, and to whom he may hope more or less to attach himself in the future."

INSOLVENT NOTES, ETC.

Quebec Official Gazette, Feb. 22.

Judicial Abandonments.

Charles Beaulieu, merchant tailor, Quebec, Feb. 15.
Archibald Blacklock, doing business under the name of J. Neville & Co., contractor, Montreal, Feb. 15.
Zéphirin Champoux, trader, parish of St. Sylvere, district of Three Rivers, Feb. 17.

B. & Z. Durocher, manufacturers and traders, Iberville, Feb. 17.

Joseph Griffith, trader, parish of St. Cyrille de Wendover, district of Arthabaska, Feb. 18.

Joseph Lavallée, district of St. Hyacinthe, Feb. 17.
E. E. Parent, Hull, Feb. 7.

Curators appointed.

Re C. G. Davies & Co., Quebec.—J. Y. Welch, Quebec, curator, Feb. 17.

Re Dame Sophronie Lauson.—Bilodeau & Renaud, Montreal, joint curator, Feb. 17.

Re Giguère & Co., Quebec.—Kent & Turcotte, Montreal, joint curator, Feb. 17.

Re Joseph Landsberg, Sherbrooke.—A. W. Stevenson, Montreal, curator, Feb. 18.

Re Macaire Laurier, Montreal.—J. McD. Hains, Montreal, curator, Feb. 15.

Re Charles J. McGrail, Montreal.—N. P. Martin, Montreal, curator, Feb. 18.

Re A. Paradis & Co., Quebec.—D. Arcand, Quebec, curator, Feb. 17.

Dividends.

Re George Bisset (of James Bisset *et al.*), Quebec.—Second dividend, proceeds of immovables, payable March 3, James Reid, Quebec, curator.

Re H. Gagnon & Co., dry goods merchants, Quebec.—Third and last dividend, payable March 10, H. A. Bedard, Quebec, curator.

Re Miller & Higgins.—Second and final dividend, W. J. Common, Montreal, curator.

Re F. X. Morency, contractor, St. Sauveur de Québec.—Dividend, payable March 12, P. Beland, Quebec, curator.

Re Alexis Paquet, trader, St. Ulric.—First dividend, payable March 8, H. A. Bedard, Quebec, curator.

Separation as to property.

Lina Deneault vs. Ludger Deslippe, farmer, parish of St. Cyprien, district of Iberville, Feb. 15.

Marguerite Lafrenière dit Baron vs. Ferdinand Gagnon, contractor, Montreal, Feb. 4.

Fridoline Leblanc vs. Olivier Séguin, tailor, Montreal, Feb. 18.

Marie Sophie Amanda Lussier vs. Napoléon Nicole, farmer, parish of St. Hyacinthe, Feb. 15.

GENERAL NOTICES.

An extravagant young man called upon a judge, and after a few remarks had passed between them, the judge looked up and asked: "Brother Lightweight, why don't you get married?" Because I can't afford it. How much do you suppose it costs me to live now?" The judge declared that he could not guess. "Well, it costs me all of \$6,000 a year just for my own living." "Dear! dear!" said the judge in a tone of astonishment. "Why, Lightweight, I wouldn't pay it. It isn't worth it!"

MR. JUSTICE FIELD.—Mr. Justice Field has sent in his resignation to the Lord Chancellor of his appointment as a judge of the Queen's Bench Division. The learned judge has just completed the fifteen years of service, entitling him to a retiring pension.

The Legal News.

VOL. XIII. MARCH 8, 1890. No. 10.

PRESCRIPTION.

In our last issue we referred to the case of *Lamontagne & Dufresne*, in which apparently it was held by the Court of Queen's Bench that the short prescriptions must be pleaded.

We come now to the case of *Breakey v. Carter*.

This case came before Mr. Justice Casault in 1881 on demurrer and law issues, and the judgment is reported in 7 Q. L. R. 286. The final judgment was rendered by Mr. Justice Stuart on the 19th April, 1883, and was in the following terms:—

"The Court etc.

"Considering that the plaintiff (Wm. Breakey) hath proved the material allegations of his declaration, and more particularly that he is the lawful owner of the lands described in his declaration, and that the defendant John Breakey, and Henry King were merchants and co-partners in the business of sawing lumber at a mill on the Chaudière River, in the parish of St. Jean Chrysostôme, in this district, called and known as the Breakey mill; that, being so engaged in manufacturing lumber, the said Henry King and John Breakey did, in the year 1873, construct a dam in and across the said river Chaudière, by means of which the waters of that river, during the spring and autumn of each year, were directed on and upon the said lands of the plaintiff, and submerged about twenty acres of the same, and that the said twenty acres became by this means and have continued to be, and still are adapted for a pond or place fitting in a high degree to hold saw logs in quantities, from 30,000 to 60,000, from all danger of being carried down into the river St. Lawrence, during the high waters of that river;

"Considering that the said firm of Henry King & Co., composed as aforesaid, having thus made a safe shelter for the saw logs floated down the said river, used and occupied the same for the safe keeping of their saw

logs, from the making of the said dam, in 1873, to the end of the year 1877, when the said property called Breakey Mills was duly sold by licitation;

"Considering that the said Henry King departed this life at the end of the year 1874, leaving his wife, the defendant Louisa Salmon Carter, and the several children, issue of his marriage with her, of which she is tutrix, representing his succession;

"Considering that the defendants continued after the decease of the said Henry King, in the occupation of the said Breakey Mills up to the time when the said mills were so sold by licitation as aforesaid, and were engaged in liquidating and winding up the affairs of the said partnership of Henry King & Co., which had existed between the said Henry King and John Breakey, and that during all the time of such liquidation, they, the said defendants, used and occupied the said property of the plaintiff, for the safe keeping of their saw logs in the same manner and extent as the said Henry King & Co. had used the same;

"Considering that the plaintiff by proceeding against the defendants, for the said use and occupation of the same, have waived any right of action for damages, if any was caused to him, the plaintiff, by the construction of the said dam, by thereby submerging the said lands;

"Considering that the plaintiff hath proved, by persons having experience in the trade and in the floating of saw logs down the Chaudière river, the value of the use and occupation of plaintiff's said property for the safe keeping of saw logs, to be \$400 a year, and that said Henry King & Co. and defendants, have together so used the said lands for four years, the Court doth adjudge and condemn the defendants jointly and severally, to pay for the causes aforesaid, to the said plaintiff, the sum of \$1600, with interest from the 11th Oct. 1880, the whole with costs, *distrais*, etc."

The defendant appealed from this judgment, Messrs. Bossé & Languedoc for appellant. On the question of prescription, appellant's counsel submitted the following argument:—

"Qu'on tourne et qu'on retourne la demande de l'intimé sur tous les sens, elle se

réduira toujours à ceci : vous avez submergé mon immeuble, et vous m'avez privé de la jouissance que j'avais droit d'en avoir, pendant un certain temps : indemnisez-moi. Qu'est ce que la jouissance d'une chose, sinon la faculté d'en retirer et de s'en approprier les fruits naturels ou civils ? Cette demande n'est donc qu'une demande d'une somme d'argent, représentant les fruits naturels du terrain du demandeur qu'il aurait pu produire, si le fait imputé à Henry King & Co, ne s'y fût opposé. Il s'en suit que l'art. 2250, C.C., s'y applique, et que la demande est prescrite par cinq années. Or il est constant par la preuve que ce n'est qu'en 1874 que Henry King & Co. se sont servi de la chaussée, que la société a été dissoute le 24 décembre de la même année, et il n'y a pas au dossier un mot de preuve pour rendre l'appellante responsable de ce qui a pu avoir lieu après la mort de son mari. De 1874 à 1880 il y a un espace de temps plus que suffisant pour que l'article 2250 prenne effet, et pour enlever à l'intimé tout recours pour ce qui a pu précéder le 8 oct. 1875. N'oublions pas que l'article 2267 statue que, dans ce cas, la créance est absolument éteinte et que nulle action ne peut être reçue."

Messrs. Langlois & Joly, for respondent, do not refer in their factum to the prescription of five years, which was not pleaded, but only to the prescription of two years as for a *quasi délit*, which was pleaded. This plea was overruled by the Supreme Court, and need not be further noticed at present.

In a "Supplementary case," however, Messrs. Langlois & Joly submitted the following argument:—

"By her factum in this Court the appellant has laid great stress upon a point not raised by the pleadings, nor even mooted in the Court below, viz : a prescription of five years against the respondent's claim, as for a demand for annual rent under article 2250 of the Civil Code.

"The demand is two-fold : 1st, for damages which still continue, and 2nd, for use and occupation, not for any stipulated term, but extending over several years.

"Without at all admitting that the present claim can be considered as one for annual rent, or that the prescription under art.

2250 is applicable, respondent begs to refer to the arbitration bond entered into between the parties by notarial deed, 31st August, 1877, whereby, after reciting the present claim, they agreed to submit the settlement of it to *amiables compositeurs*, and in the most formal way bound themselves to abide by their decision. The parties, by that deed, certainly interrupted any prescription which might then have commenced to run, and it is only from that time that any new prescription could take its date of beginning.

"Renunciation of prescription is express or tacit. C.C. 2185.

"Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs. C.C. 2227 ; *Delisle v. McGinnis*, 4 L.C.J. 145 ; *Walker v. Sweet*, 21 L.C.J. 29."

The following opinion was delivered by Ramsay, J., one of the majority of the Court:—

RAMSAY, J. :—

"This is an appeal from a judgment condemning appellant, along with John Breakey, a brother of respondent, to pay jointly and severally to respondent a sum of \$1600 for the use and occupation of a piece of land flooded by a dam built by defendants, and on which they boomed logs.

"The appellant's first point is that for a large part of the demand there is a prescription of five years which, though not pleaded, should be taken notice of, and applied by the Court. The argument is this. By Article 2188, C. C., it is declared that the Court cannot of its own motion supply the defence resulting from prescription, except in cases where 'the right of action is denied'. Therefore it is said that the Court must of its own motion supply the defence resulting from such prescription. Again, it is said that the present action is under Article 2250, C. C., and that Article 2250 is one of those cases in which after the lapse of five years the right of action is denied (2267, C. C.). On the part of the appellant the French version was cited. It differs a little from the English version as it says, 'nulle action ne peut être reçue', while the

other version says, 'no action can be maintained'. The difference of these texts is important, but I think we are obliged to take the English version. In the first place the article is new law, and totally at variance with our common law, and therefore the innovation should be as restrained as possible. In the next place the idea of limitations comes from the English law, and there the action is not denied. It is not maintained if pleaded. This is the view which has always been taken here since the Code. It was so held by this Court in *Lamontagne & Dufresne et al.*, Sept. 1874. And a similar opinion was expressed by Aylwin and Badgley, JJ., in *Wilson & Demers*, 2 L. C. L. J. 251. And we have invariably refused to reject on demurrer an action taken after the prescription accomplished.

"We have held repeatedly that under the Chapter 51 C. S. L. C. the right to proceed by *expertise* does not divest the Courts of their jurisdiction. But at any rate the action does not fall within the Chapter of the C. S. L. C., as it has been dealt with by the Court below, and as appellant does not insist on the point, we need not follow it further. We may therefore turn to the evidence in support of the action.

"The demand of plaintiff is peculiar. He complains that defendants have damaged his property, and claims damages for this, and in the same breath he asks for rent far beyond the value of the property for ordinary purposes, owing to the use to which this objectionable dam allows the property to be turned. Very naturally the Court below rejected the damages. It is evident that the plaintiff could not be indemnified twice, once by way of rent and once by way of damages. Having reduced the indemnity to rent, it becomes a question as to what is a fair rent where none has been stipulated. Plaintiff seems to think the rent should be fixed on the special use it was to defendants. It strikes me that this is a totally false basis of indemnity, as false for indemnity for rent, as if it were attempted to be made the indemnity for damages. If that were the true measure of indemnity, then by parity of reasoning we should have to say that the

value of services rendered was to be estimated by the gain of the party served, and an apothecary might reasonably ask any price he pleased for a drug which had saved a patient's life.

"If there had been no other measure of damages proved, we might perhaps have been obliged to take that established by plaintiff, based on the price charged in 'a cove for keeping logs; but we have other evidence. It is proved that this land was estimated at a much lower rate, and we have other evidence that its total value is about half what has been given as a substitute for the rent. It seems to me that to confirm this judgment would be to plunder the appellant, and I am therefore to reduce the amount to \$50 a year or \$200 for the four years.

"The cross appeal should be dismissed with costs."

The judgment in appeal as recorded is as follows:—

"Considering that the respondent has proved that he has suffered damages by reason of the obstructions complained of in the declaration in this cause, and by the overflowing in consequence thereof of a portion of his property mentioned in the declaration in this cause, to the extent of \$50 a year, and that when he brought his action, he was entitled to claim damages for a period of four years amounting in all to the sum of \$200;

"And considering that there is error in the judgment rendered by the Superior Court on the 19th of April, 1883, by which the appellant has been condemned to pay to the respondent the sum of \$1600 for damages claimed by the present action, instead of that of \$200;

"This Court doth reverse the said judgment of the 19th of April, 1883;

"And proceeding to render the judgment which the Superior Court should have rendered;

"Doth condemn the appellant *de nom et qualite* to pay to the respondent the said sum of \$200, with interest from the 11th of October, 1880, and the costs incurred in the Court below, and doth condemn the re-

spondent to pay to the appellant the costs incurred on the present appeal."

Tessier and Cross, JJ., dissented from this judgment, but the judgment does not state whether the dissent applied only to the modification of amount, or whether it referred to any of the questions raised by the appeal.

In the Supreme Court, May 12, 1885, the judgment was again modified by increasing the amount of the annual value, and the Court also applied the five years' prescription, which had the effect of reducing the amount of the claim. The holding in Cassels' digest is given as follows:—

"4. Under art. 1608 of the C. C., the respondents were to be considered lessees and subject to all the rules respecting leases, and the annual value of their occupation should be considered the rent, none having been fixed by the parties. Therefore the appellant was subject to the prescription of five years under Art. 2250 C. C., and this prescription in virtue of Art. 2188 C. C., is one which the tribunals are bound to give effect to although not pleaded, and only set up for the first time in the respondent's factum in the Court of Queen's Bench."

The case has never been reported at length, but the principal opinion was delivered by Mr. Justice Fournier, and was as follows:—

FOURNIER, J.:—

"L'appellant réclame des intimés la somme de \$3,500 pour l'usage et occupation d'une partie de sa terre, située le long de la rivière Chaudière, près du moulin à scie des intimés, sur laquelle ceux-ci ont, par la construction d'une chaussée, fait refluer l'eau de manière à faire de ce terrain une sorte d'étang qui leur est de la plus grande utilité pour y mettre leurs billots en sûreté contre les dangers des crues subites et considérables auxquelles est particulièrement sujette la rivière Chaudière.

"En outre de la dénégation générale les intimés ont invoqué contre cette action la prescription de deux ans établie par l'art. 2261, C. C., contre la réclamation pour dommages résultant des délits ou quasi-délits. Il ont prétendu aussi que l'appellant ne pouvait

faire valoir sa réclamation que par le mode indiqué par le ch. 51 des Stats. Ref. B.-C.

"La Cour Supérieure et la Cour du Banc de la Reine ont été d'accord à rejeter ces deux moyens de défense. La première, fondée sur la prescription, a été renvoyée sur le principe que le ch. 51, reconnaissant à un propriétaire le droit dans l'exploitation des cours d'eau de faire des travaux qui peuvent avoir l'effet de faire refluer l'eau sur une propriété voisine, la construction d'une chaussée ayant cet effet ne peut être considéré comme un *quasi-délit*, mais plutôt comme l'exercice d'un droit de servitude qui donne à celui qui en souffre un recours en indemnité contre l'auteur du dommage. Pour cette raison l'art. 2261, C. C., ne peut être opposé au droit d'action de l'appellant. Quant au deuxième moyen, que ce n'était pas par une action ordinaire mais par les procédés d'expertise indiqués par le ch. 51 que l'appellant devait exercer son recours, la réponse à cette objection est que la jurisprudence établie depuis longtemps a reconnu que ce mode est facultatif et n'exclut pas le recours à l'action ordinaire.

"Sur la question d'estimation de la valeur de l'usage et occupation, les deux cours qui ont déjà prononcé sur cette cause ont différé d'opinion—la Cour Supérieure a porté cette estimation à la somme de \$400 par année et la Cour du Banc de la Reine à \$50.

"L'appellant a fait preuve par un nombre de témoins d'une haute respectabilité et d'une grande compétence. Ils ont varié depuis \$300 à \$500 dans les chiffres qu'ils ont donnés. Leur estimation est basée sur le fait que la propriété de l'appellant, située comme elle l'est à proximité des moulins des intimés et offrant à ceux-ci un réservoir où ils peuvent avec la plus grande facilité mettre des quantités considérables de billots à l'abri des dangers des crues subites de la rivière Chaudière, a, pour cette considération une très grande valeur. Les témoins de la défense ont basé leur estimation sur l'évaluation municipale et sur le revenu que pourrait donner ce terrain s'il était mis en apport comme propriété agricole, sans aucunement tenir compte de l'usage qui en est actuellement fait, et ils en ont porté le revenu à \$50 par année. Ces témoins pour la plupart, évalua-

teurs de la municipalité ou cultivateurs, n'étaient pas en état d'estimer cette propriété autrement que comme propriété agricole. Ils ne prétendent pas non plus en donner la valeur comme faisant une partie indispensable d'un grand établissement industriel; tandis que c'est à ce dernier point de vue que les témoins de l'appelant ont principalement donné leur attention dans l'estimation qu'ils en ont faite. Ce sont presque tous de grands propriétaires de moulins et de manufactures de bois, en état de donner la juste valeur d'une propriété comme celle dont il s'agit. Quelques-uns d'entre eux paient même pour l'usage de propriété du même genre des prix aussi considérables que ceux qu'ils ont fixés pour la valeur de l'usage et occupation de celle de l'appelant. Ils ont, avec raison, pris comme base de cette estimation l'usage qui était actuellement fait de la propriété tandis que les autres se sont uniquement basés sur l'exploitation agricole qui pourrait en être faite. Si la propriété de l'appelant est susceptible d'être employée à des usages différents et plus ou moins lucratifs les uns que les autres, serait-il raisonnable de le forcer d'adopter le mode d'exploitation qui lui rapporterait le moins? Il a incontestablement le droit d'en tirer le meilleur parti possible. Si la propriété de l'appelant était en culture et qu'il s'agirait de l'exproprier, ne faudrait-il pas pour déterminer le montant de l'indemnité, prendre en considération les divers usages auxquels il serait possible de la mettre? La proximité du moulin des intimés et les grands avantages qu'elle offre comme réceptacle pour leurs billots, ne seraient-ils pas d'excellentes raisons pour faire voir qu'indépendamment de sa valeur agricole, cette propriété par suite de ces diverses circonstances se trouve avoir une valeur encore beaucoup plus considérable? D'après le principe énoncé par le Conseil Privé dans la cause de la *Cité de Montréal v. Brown et Springle*, 2 App. Cas. 184: "That the prospective capabilities of land may form, and very often is, a very important element in the calculation of its value," les circonstances mentionnées plus haut doivent être prises en considération dans l'estimation de sa valeur. Mais dans le cas actuel l'appelant n'en est pas réduit aux conjectures sur l'emploi de sa

propriété; l'usage qu'en font les intimés comme réceptacle pour leurs billots n'est pas seulement un des emplois possibles de cette propriété, mais c'est l'usage qui en est actuellement. Si cet emploi, comme il n'y a pas à en douter d'après les témoignages, est plus profitable que la mise en culture; c'est sans doute à l'appelant comme propriétaire que les profits doivent en revenir.

"A part de l'estimation faite par les témoins il y en a une autre qui ne me paraît pas avoir reçue l'attention qu'elle mérite. C'est celle qui en a été faite par les intimés eux-mêmes par une entrée dans leurs livres de compte de la somme de \$200, dont ils se reconnaissaient débiteurs de l'appelant pour une année d'usage et occupation de sa propriété. C'est une admission de leur part que la jouissance de cette propriété leur valait au moins cette somme. Il est en preuve que cette entrée a été faite pendant que l'appelant était en Angleterre, et que lorsqu'il en a eu connaissance il a déclaré que ce montant était tout-à-fait insuffisant. Cette entrée qui ne pouvait lier l'appelant liait au moins les intimés, et il me semble que la Cour du Banc de la Reine ne pouvait après la preuve de cette entrée accorder moins que les intimés avaient eux-mêmes reconnu. J'ai été sur le point de m'arrêter à ce montant, mais après un nouvel examen de la preuve de l'appelant j'ai cru qu'il ne serait pas juste de le limiter à l'admission faite par sa partie adverse tandis que la moyenne du montant établi par une preuve très satisfaisante lui donnait droit au double de ce montant.

"Maintenant pour combien doit-on accorder la valeur de l'usage et occupation des terrains en question en question? L'appelant a prétendu dans sa déclaration que les intimés en ont pris possession dans l'été de 1871 et les ont occupés jusque dans le mois de mars 1878, ce qui ferait d'après lui six ans et quelques jours, mais la preuve de la durée de cette occupation ne justifie pas cette prétention. La Cour Supérieure a considéré que le témoignage de Colston, teneur de livres des intimés, qui a fixé d'après les livres le commencement de l'occupation à l'année 1873, devait être suivi, et se fondant sur ce témoignage elle a décidé que cette occupation avait duré quatre années, de 1873 jus-

qu'à la fin de l'année 1877, et elle a accordé \$1,600 comme la valeur de l'usage et occupation à raison de \$400 par année.

"Nous sommes sur ce point du même avis que la Cour Supérieure, mais l'action de l'appelant n'ayant été intentée qu'en octobre 1880, il s'était donc écoulé 6 ans, 4 mois et 11 jours depuis l'époque reconnue par la Cour comme le commencement de l'usage et occupation. La Cour peut-elle accorder comme l'ont fait les Cours Supérieure et du Banc de la Reine, quatre années de la valeur d'usage et occupation, une partie de cette demande n'est-elle pas éteinte par la prescription de cinq ans? Les intimés ont invoqué la prescription de deux ans qui évidemment n'avait pas d'application dans ce cas, mais n'y a-t-il pas lieu à la prescription de cinq ans qu'ils n'ont point plaidé, et la Cour, malgré cette omission de leur part, n'est-elle pas obligée d'y suppléer? L'action en cette cause est fondée sur l'usage et occupation du terrain de l'appelant. En vertu de l'art. 1608, C. C., les intimés sont réputés locataires et sujets à toutes les règles concernant les baux, et la valeur annuelle de cette occupation est censée être le loyer dont les parties n'ont pas fixé le montant. La réclamation de l'appelant est en conséquence sujette à la prescription de cinq ans en vertu de l'art. 2250, C. C.

"Cette prescription en vertu de l'art. 2188, C. C., et l'art. 2267, C. C., est une de celles que les tribunaux sont tenus de suppléer d'office.

"Pour cette raison, la Cour est obligée de faire la réduction de cette partie de la demande contre laquelle la prescription de cinq ans aurait dû être plaidée, et de n'allouer que la somme de \$862 (déduction pour un an, neuf mois et onze jours) pour laquelle il doit y avoir jugement.

"En conséquence, l'appel est alloué, et le jugement réformé de la manière qu'il vient d'être dit."

TASCHEREAU, J. :—

"I concur in the reasons given by my brother Fournier, that the judgment for the appellant should be \$862."

In a subsequent case of *Dorion v. Crowley* May 17, 1886, the Supreme Court again applied the same principle to the two years'

prescription, the holding given in *Cassels*, 420, being as follows :—

"Held :—That although the objection that the right of action has been prescribed is taken for the first time on the argument in appeal, the Court is bound to entertain it and give effect to it if properly raised."

In the case of *Dorion v. Crowley*, we are informed, Mr. Justice Taschereau announced the conclusion at which the Court had arrived, and merely observed that the point had doubtless been overlooked in the Court below.

In the cases of *Lamontagne & Dufresne* and *Carter & Breakey*, it will be observed that the question of prescription affected only a fraction of the demand, and does not appear to have been discussed at any length in the Supreme Court.

The question does not appear to have come yet before the Judicial Committee of the Privy Council.

We have taken some time to set these cases fully before the profession. In conclusion, it may be asked whether the old rule was not the better and the safer one—the rule stated by Pothier: "Les fins de non recevoir doivent être opposées par le débiteur; le juge ne les supplée pas"; and whether the reversal of this rule does not rest upon a slender basis? If so, it seems to be a proper occasion for the legislature to intervene, and remove the difficulty created by the wording of Arts. 2188 and 2267, by a declaration of the law.

THE ELECTORAL FRANCHISE.

By an Act passed during the present session, to amend 52 Vict. (Q.), ch. 4, it is enacted as follows :—

1. Paragraph 16 of Art. 167 of the Revised Statutes of the Province of Quebec, as amended by section 1 of chapter 4 of the Act 52 Victoria, is replaced by the following :

"16. The word "student" means the son who, being within the above prescribed conditions, and within those of the 9th paragraph of article 173, is absent from his father's or mother's house, with their consent, with a view of studying some profession."

2. The last three clauses of article 173 of

the said Revised Statutes, as replaced by section 3 of chapter 4 of the said Act, 52 Victoria, are replaced by the two following paragraphs :

"8th. Farmers' sons exercise the above rights, even if the father or mother be tenants or occupants only of the farm ;

They exercise them in the same manner as if they were the sons of owners of real property, with this difference, that it is the annual value of the farm which is the basis of the electoral franchise, as in the case *mutatis mutandis* of the 1st and 2nd paragraphs of this article.

"9th. Temporary absence from the farm or establishment of his father or mother, during six months of the year in all, or absence as a 'student', shall not deprive the son of the exercise of the electoral franchise above conferred."

3. The Act passed during the present session intitled : "An Act to provide for the immediate operation of the Act of this Province, 52 Vict., chap. 4, intitled : 'An Act to amend the Quebec Election Act, by extending the franchise, and to amend the Municipal Code respecting the preparation of the valuation roll,'" shall be carried out according to the intention thereof, the doubts which may have existed owing to the citation of certain paragraphs of article 173 of the said Revised Statutes being removed by this Act.

4. This Act shall come into force on the day of its sanction.

NEW PUBLICATION.

INSOLVENCY MANUAL: by Mr. R. S. Weir, B.C.L., Advocate, Montreal: A. Periard, publisher. This is a little work of 84 pages, in which the editor collates the decisions rendered under the Quebec Statute, 48 Vict. ch. 22, which made important changes in the law of insolvency. The cases relating to *capias*, as well as those applicable to reversion of goods and conservatory attachments, have also been incorporated. The work will doubtless be found useful and convenient to the practitioner.

CROWN CASES RESERVED.

LONDON, Feb. 1, 1890.

REGINA V. WHITCHURCH ET AL.

Criminal Law—Conspiracy to Procure Abortion—Instruments used on Woman with her Consent—Mistaken Belief of Pregnancy—Conviction of Woman for Conspiracy.

Case reserved by WILLS, J.

In this case Thomas Whitchurch, John Howe, and Elizabeth Cross had been convicted at the Northampton Assizes for conspiring and agreeing together feloniously to procure the miscarriage of Elizabeth Cross by the administration of drugs and the use of instruments. The drugs and instruments were used with the consent of Elizabeth Cross and with the mistaken impression that she was pregnant. The learned judge was of opinion, and so directed the jury, that whether or not it was no offence for a woman not pregnant to do acts to herself intending thereby to procure an abortion, which was actually impossible, it was none the less criminal in her to conspire to commit a felony, because the commission of the felony was rendered impossible by circumstances unknown to her; also, that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained, if effected by herself alone, might not have been criminal, 24 & 25 Vict. c. 100, s. 58. The question argued was whether the conviction of Elizabeth Cross could be sustained.

The COURT (LORD COLERIDGE, C.J., POLLOCK, B., HAWKINS, J., CHARLES, J., and GRANTHAM, J.) were of opinion that the conviction was right.

Conviction affirmed.

LONDON, Feb. 1, 8, 1890.

REGINA V. MILES.

Criminal Law—Assault—Indictment after Summary Conviction—Plea of Autrefois Convict.

This was a case stated for the consideration of the Court for Crown Cases Reserved.

The defendant had been convicted at the Central Criminal Court upon an indictment

which charged him (in the first count) with unlawfully and maliciously wounding the prosecutor; (in the second count) with unlawfully and maliciously inflicting grievous bodily harm; (in the third count) with causing actually bodily harm to the prosecutor; and (in the fourth count) with common assault. The defendant pleaded and pointed out at the trial the following conviction in respect of this same assault before a Court of Summary Jurisdiction: 'G. J. Miles, hereinafter called the defendant, is this day convicted for that he . . . did unlawfully assault and beat one Chubs Living, and the Court being of opinion that the said offence was of so trifling a nature that it is inexpedient to inflict any other than a nominal punishment, and the defendant having given security to the satisfaction of the Court to be of good behaviour, is discharged.'

The question for the opinion of the Court was whether the above summary conviction was a bar to the proceedings against him at the Central Criminal Court for the same offence.

Poland, Q.C., and *Warburton*, for the defendant: Express power is given by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 16, subs. 2, to justices, upon convicting a person of assault, to discharge him conditionally on his giving security to be of good behaviour; and the provisions in 24 & 25 Vict. c. 100, s. 45, must now be read with the section above referred to. Moreover, apart from statutes, the summary conviction formed a bar at common law to the present indictment.

Lockwood, Q.C., and *Besley*, for the prosecution: 24 & 25 Vict. c. 100, s. 45, only operates as a bar where a defendant 'shall have paid the whole amount adjudged or shall have suffered the imprisonment awarded;' but the Court neither fined nor imprisoned the defendant. The proceedings under the Summary Jurisdiction Act, 1879, did not bring the case within section 45 of the earlier statute.

Cour. adv. vult.

THE COURT (LORD COLERIDGE, C.J., POLLOCK, B., HAWKINS, J., CHARLES, J., and GRANTHAM, J.), upon the above facts, held that the summary conviction was a good answer at common law to the indictment, apart altogether from the question whether the defendant was entitled to the protection afforded by 24 & 25 Vict. c. 100, s. 45.

Conviction quashed.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, March 1.

Judicial Abandonments.

- Theo. Alain, card board manufacturer, Montreal, Feb. 25.
 Ephrem Bolduc, district of Joliette, Feb. 25.
 Cyrille Quintal Boucher, Montreal, Feb. 27.
 FRS. Côté, Quebec, Feb. 28.
 Joseph Léopold Gravel, jeweller, Montreal, Feb. 15.
 E. A. Panet & Co., traders, St. Raymond, Feb. 24.
 William Patrick Price, grocer, Montreal, Feb. 15.

Curators appointed.

- Re Abraham Barré, l'Ange Gardien.*—J. Morin, St. Hyacinthe, curator, Feb. 22.
Re Archibald Blacklock, contractor, Montreal.—N. P. Martin, Montreal, curator, Feb. 24.
Re Blumenthal, Rosenthal & Co.—J. Morin, St. Hyacinthe, curator, Feb. 22.
Re Paul Chevalier, trader, Berthier.—A. Demers, advocate, Berthier, curator, Feb. 19.
Re A. E. Désautels, St. Pie.—J. C. Désautels, N.P., St. Hyacinthe, curator, Feb. 22.
Re Dame Célanire Roy, doing business under the name of Aimé Béliveau & Co.—P. E. E. de Lorimier, Montreal, curator, Feb. 20.
Re J. L. Gravel.—C. Desmarteau, Montreal, curator, Feb. 24.
Re M. Guillet, Three Rivers.—Kent & Turcotte, Montreal, joint curator, Feb. 20.
Re C. O. Lamontagne.—Kent & Turcotte, Montreal, joint curator, Feb. 20.
Re Landon Dry Plate Co., Montreal.—H. A. Jackson, Montreal, curator, Feb. 3.
Re Corinne Larivière, Three Rivers.—Bilodeau & Renaud, Montreal, joint curator, Feb. 20.
Re Rémi Maillet.—C. Desmarteau, Montreal, curator, Feb. 21.
Re Edouard Pleau.—F. Valentine, Three Rivers, curator, Feb. 24.
Re Wm. P. Price.—C. Desmarteau, Montreal, curator, Feb. 25.
Re F. X. Sarrasin, Three Rivers.—Kent & Turcotte, Montreal, joint curator, Feb. 24.
Re S. Thérien, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 20.

Dividends.

- Re André Beauregard*, trader, St. Hyacinthe.—Dividend, payable March 18, J. Morin, St. Hyacinthe, curator.
Re L. A. Bergerin, Quebec.—First dividend, payable March 17, H. A. Bedard, Quebec, curator.
Re Pierre Blais, trader, St. Flore.—First and final dividend, payable March 17, H. A. Bedard, Quebec, curator.
Re Th. Brodeur, hotel-keeper, St. Liboire.—First and final dividend, payable March 18, J. Morin, St. Hyacinthe, curator.
Re L. E. Gélinas, Ste. Brigitte des Saules.—First and final dividend, payable March 18, J. E. Girouard, Drummondville, curator.
Re L. E. Guimond, township of Dundee.—First and final dividend, payable March 18, C. Desmarteau, Montreal, curator.

Separation as to Property.

- Emma Baigley vs. Joseph Napoléon Landry, Joliette, Feb. 20.
 Marie Agnès Béland vs. Evariste Rivard, Yama-chioche, Feb. 24.
 Marie Anne Therrien vs. Félix alias Philéas Désormiers, wood dealer, Montreal, Jan. 16.

The Legal News.

VOL. XIII. MARCH 15, 1890. No. 11.

The vacancy in the Court of Queen's Bench caused by the death of Mr. Justice Manisty, has been filled by the appointment of Mr. R. V. Williams, Q.C., son of the late Mr. Justice Williams, of the Court of Common Pleas. The new Judge was born in 1838, educated at Oxford, and was appointed Q.C. last year. The *Law Journal* says that at the bar Mr. Williams speedily earned a name for hard work. "The Bankruptcy Act, 1869, by overturning the whole of the previous practice, afforded an opening of which he promptly availed himself, and his work on Bankruptcy, which appeared in 1870, was completely successful, and pronounced not unworthy of its dedication to the eminent writer and ex-judge, his father. Nearly twenty years of steady plodding in the interests of his clients, varied by the chief part in the labour of producing successive editions of his own work on Bankruptcy and of the standard work on Executors which is his by descent, have caused his appointment to the vacant judgeship, to be looked on by the profession as the just reward of conscientious toil."

The *Law Journal*, referring sarcastically to the mode in which cause lists are sometimes slaughtered, observes:—"There ought to be a *tertium quid* between the two extremes of painful deliberateness and speedy execution. It may perhaps be useful now and then to remind our judges that the few litigants who still resort to the regular tribunals of their country are not satisfied with having their cases disposed of, and prefer to have them tried."

THE CRIMINAL LAW OF CANADA.

Criminal Law as a substantive branch of jurisprudence is of comparatively modern growth. The early tendency of law-givers was to punish offences against the sovereign

power by executive or legislative acts merely designed to meet the particular occasions which evoked them, while offences against individuals—such as homicide or theft—although endangering the public welfare, were treated as civil injuries to be requited by pecuniary damages. In the Roman Law, acts which are now regarded and punished by all civilized nations as crimes were defined as *delicts* or wrongs, and instead of being corrected by the intervention of the state, were left to the prosecution of the injured parties, or their representatives. Hence the *corpus juris civilis*, which formed so rich a store-house to the nations of modern Europe in establishing their several systems of private rights and remedies, afforded no guidance to them in formulating laws for the repression of wrongs which menaced the security of the state. The first attempt to promulge a criminal code was the "Constitutio Criminalis Carolina" of the Emperor Charles V, of Germany, which was the forerunner of the present German penal code,—"*Strafgesetzbuch für das Deutsche Reich*." It was not until 1810 that France adopted her *Code Pénal*, which afforded an exemplar long looked for by the Latin races of the continent, and which they were quick to profit by. Even so late as the year 1845 the criminal law of England was in so loose and unsatisfactory a state that an eminent legal author of that period was forced to admit that "no candid commentator could pronounce upon it a quite unmixed encomium." But there has been much accomplished in the way of legal reform since that time, and, as the utility and ethical significance of a code as applied to criminal law has now taken strong hold upon the minds of English lawyers, before very long we may expect to see a legislative adoption of the Draft Penal Code which has been under the consideration of the Imperial Parliament for some time past.

In giving us a Digest of the Criminal Law of Canada,* based upon Sir J. F. Stephen's

* A DIGEST OF THE CRIMINAL LAW OF CANADA (Crimes and Punishments) founded by permission on Sir James Fitzjames Stephen's Digest of the Criminal Law, by George Wheelock Burdidge, A. B., D. C. L., Judge of the Exchequer Court of Canada. Toronto, Carswell & Co., 1890.

work of a similar character as applied to the criminal law of England, Mr. Justice Burbridge has made a most valuable addition to the scanty legal literature of Canada, and that both teachers and practitioners of the law will be quick to avail themselves of the release from much irksome research which is here afforded them, goes without the saying. A digest is a systematised collection of laws, and only differs from a code in that it lacks legislative sanction and official promulgation. Only those who are obliged by their calling, to ascertain the law by delving and toiling amongst the accumulated statutes and precedents of centuries can appreciate the value of such a work as the one under consideration.

The arrangement of Sir J. F. Stephen's Digest has been as closely followed by Judge Burbridge as circumstances would permit, and upon that head, as well as with regard to such portions of his book as literally reproduce the matter of the English work, little need be said. It is true that the method adopted by the English author of explaining the law by means of illustrations is open to the logical objection against argument by example, and it is moreover true that there is a case in the books where Lord Coleridge, C. J., shows that the learned Judge Stephen in one instance at least falls into a very obvious fallacy in endeavouring to settle a legal principle upon a dialectical basis. (*The Queen v. Ashwell*, 16 Q. B. D., at p. 224). Yet, in the main, the illustrations in his Digest are sound in principle, and are found to be most helpful to a clear understanding of the law.

A cursory inspection of Judge Burbridge's work is sufficient to show that his labors have been far more comprehensive than those of an editor only. The scheme of his Digest carries him beyond the limit where the work of the English author furnishes him with a beaten path, and compels him to explore fields of colonial law hitherto untravelled by commentators. It is a signal tribute to Judge Burbridge's learning and research that a thoughtful consideration of those portions of the book which are peculiarly his own impresses one with the conviction that they are comparable in a high degree with the matter contained in his

English model. This is particularly true of the first chapter of the book. It deals with a subject of paramount importance to the law-student, as well as to every practising lawyer in the country,—“the application of the Criminal Law.” This chapter is subdivided into two articles treating of (1) the territorial application of the Criminal Law of Canada, and (2) the application of the Criminal Law of England in Canada. Although this chapter comprises only four and one-half pages of the book, yet within that limited space may be found, in text and foot-note, an exhaustive exposition of all the sources of law relating to Crimes and Punishments now in force in the several provinces of the Dominion whether by importation from the mother country at the time of conquest or settlement, or by subsequent Imperial, Provincial, or Federal parliamentary enactment. This speaks well for the power of condensation of the learned author.

Again, there are instances in abundance where our own criminal statute law is wholly different from that of England, and in dealing with them Judge Burbridge's work is, of course, entirely original, except in point of arrangement, which is uniform throughout. The copious foot-notes to the text, printed in minion, are most useful epitomes of all the important decisions of our courts bearing upon the interpretation of the statutes here referred to, and will be duly appreciated by those who have recourse to them.

Besides these estimable features of the book, wherever Judge Burbridge has adopted the text and notes of the English author he has added notes of his own which greatly enhance the value of the original matter. The index and tables of cases and statutes have been carefully prepared by Mr. Charles H. Masters, Assistant Reporter of the Supreme Court of Canada, a gentleman of experience in this department of book-making, and who recently performed a similar service for Mr. Justice Taschereau in the preparation of the 2nd edition of his well known compilation of the Criminal Acts.

Space has only permitted me to barely indicate what seem to me the salient features of a work which I venture to aver has few equals among the publications heretofore

issued by Canadian jurists. By its arrangement, it is so well qualified for the purposes of the student that it must certainly become a text-book in our law schools; and it should have a ready sale amongst the profession generally as no library will be complete without so valuable a compendium.

CHARLES MORSE.

Ottawa, 7th March, 1890.

SUPERIOR COURT—MONTREAL.*

Libel in pleading—Pertinency of allegations—Malice.

Held:—(Reversing the decision of OUMMET, J., M. L. R., 4 S. C. 424), That the pertinency of a libellous allegation in a pleading is a justification only when the allegation is made in good faith, with probable cause, and without intention to injure; and the proof of these facts is incumbent on the party making such allegation; and in the absence of evidence of the truth of the allegation, or of probable cause, malice will be presumed. And so where the plaintiff in an action to annul an election, alleged subornation of perjury and other offences against the defendant, and made no proof in support of the charges, he was condemned to pay \$100 damages.—*Charlebois v. Bourassa*, in Review, Loranger, Wurtele, Davidson, JJ., June 8, 1889.

Contract—Right of passage—Interruption—Waiver.

Held:—That where road trustees commuted for an annual payment the tolls payable by a street railway company travelling on a certain road, and the company agreed that the trustees, or the municipalities within whose limits the road was situated, should have the right to take up the road for certain purposes, without the company being entitled to any compensation or damages therefor, that the company was estopped not only from claiming damages, but also any diminution of the annual commutation payment for loss of use.—*Trustees of the Montreal Turnpike Roads v. Montreal Street Ry. Co.*, in Review, Taschereau, Wurtele, Davidson, JJ., Dec. 29, 1888.

* To appear in Montreal Law Reports, 5 S. C.

Prescription—Interruption par la faillite—Arts. 2224, 2232, C. C.—Acte de faillite 1864.

Jugé:—Que la faillite du débiteur en juillet 1865, accompagnée d'un bilan où la créance est portée par le failli, mais avec le nom d'un créancier autre que le créancier véritable, suspend la prescription durant tous les procédés en liquidation forcée, et que le créancier véritable, ou son cessionnaire, peut en 1885, vingt ans plus tard, et vingt-deux ans après l'existence de la dette prescriptible par cinq ans comme dette commerciale, mais avant la liquidation finale de la faillite, produire valablement une réclamation qui lui permette d'être colloqué avec les autres créanciers.—*In re Stephen*, failli, *Seath*, réclamant, et *Hagar*, contestant, Pagnuelo, J., 30 déc. 1889.

Novation—Deed of composition—Art. 1169, C. C.

Held:—Where a creditor, whose claim does not appear to be of a commercial nature, becomes a party to a voluntary deed of composition with his debtor, by the terms of which he remits half of the debt, and the interest, and agrees to accept the remainder by instalments, with security, without stipulating that the debtor shall not be discharged until the composition is fully paid,—that novation is effected; and the creditor has no right, upon the debtor's default to pay the instalments of the composition as they become due, to issue execution *de plano* upon the judgment obtained by him for the original debt.—*Vincent v. Roy dit Lapensée*, et *Roy oppt.*, in Review, Johnson, Loranger, Wurtele, JJ., Jan. 31, 1889.

Quebec Controverted Elections Act, s. 41—R. S. Q. 500—Mis en cause—Preliminary objections—Review.

Held:—That the *mise en cause* (whether by the answer to the petition or subsequently) of any other candidate not petitioner in the cause, is in the nature of an election petition, and is subject to the rules prescribed for such petitions; and an appeal lies to the Superior Court sitting in Review, under s. 41 of the Quebec Controverted Elections Act (R. S. Q. 500), from a judgment maintaining preliminary objections of the *mis en cause*.—*Séguin v. Rochon*, et *Cormier*, *mis en cause*, Jetté, Loranger, Davidson, JJ., June 8, 1889.

Quebec Controverted Elections Act—R. S. Q.
514—*Mis en cause—Trial.*

Held :—That after the *enquête* on the trial of an election petition has been closed, the respondent is no longer entitled, under R. S. Q. 514, to adduce evidence to show that any other candidate has been guilty of corrupt practice.—*Séguin v. Rochon, et Cormier, mis en cause, Doherty, Mathieu, Tait, J.J., Oct. 3, 1889.*

Quebec Controverted Elections Act—R. S. Q.
514—*Trial—When concluded.*

Held :—That the trial of an election petition is concluded when the *enquête* of petitioner and respondent has been closed; and it is not competent thereafter for the respondent to give notice, under R. S. Q. 514, that he intends to prove that another candidate not in the cause has been guilty of corrupt practices.—*Séguin v. Rochon, et Cormier, mis en cause, Doherty, Tait, deLorimier, J.J., Oct. 3, 1889.*

Quebec Controverted Elections Act—Preliminary objections—Service of petition—Description of electoral district—Stamps—Corrupt practice—Knowledge of candidate—Evidence.

Held :—1. A petition presented on the 7th November and served on the following day, the notice of election having been published on the 8th October—is within the delay prescribed by R. S. Q. 482.

2. The description of the electoral district, in the petition, as "the electoral district of *the County of Ottawa*," instead of "the electoral district of *Ottawa*," is not a sufficient ground for rejecting the petition, the electoral district being in fact composed of the county of Ottawa alone.

3. In a district where the fee on filing petition is payable in money to the clerk of the Court, and has been duly paid, the absence of stamps on the petition is not an irregularity.

4. The fact that large sums were being illegally spent by the agents of a candidate, and that this circumstance must have been known to those who were engaged in promoting his election in that part of the county, is not of itself sufficient to prove knowledge by the

candidate of corrupt practice, where it appears that he was not present at the place where the money was being disbursed, but was engaged in a remote part of the county. Knowledge of corrupt practice must be clearly established, and where the evidence is so contradictory as to raise a doubt, the defendant is entitled to the benefit of the doubt.—*Séguin v. Rochon, et Cormier, mis en cause, Jetté, Wurtele, Davidson, J.J., Dec. 30, 1889.*

CIRCUIT COURT.

MONTREAL, March 4, 1890.

Before DOHERTY, J.

HAEFNER V. RUSS & THE WINDSOR HOTEL Co., T.S.

Workman's Wages—Art. 628, C.C.P.—Petition to quash saisie-arrest before judgment.

Action for \$48.75 money loaned, with attachment before judgment.

Defendant, who is employed as cook's fireman at the Windsor Hotel, petitioned to quash the *saisie-arrest* before judgment, and in any event to release three-fourths of the amount seized in virtue of Section 5 of Article 628 of the Code of Civil Procedure as amended.

PER CURIAM :—The defendant is a domestic servant and consequently not entitled to the exemption claimed. Upon the other grounds defendant has failed to establish the allegations of his petition which is dismissed.

W. J. White, for plaintiff.

Carter & Goldstein, for defendant and petitioner.

COUR DE MAGISTRAT.

MONTREAL, 19 septembre 1889.

Coram CHAMPAGNE, J. C. M.

TORRANCE V. CURRIE.

Cour de Magistrat de district—Cour de Magistrat de la cité—Jurisdiction.

JUGÉ :—*Que la taxe des frais faits en justice doit se faire devant le tribunal où les procédés ont eu lieu, et que la Cour de Magistrat de la cité n'a pas de juridiction pour décider si des frais étaient dus par aucune des parties dans une poursuite intentée devant la Cour de Magistrat du district de Montréal qui a existé, mais qui n'a plus d'existence.*

Le demandeur a institué une action devant la Cour de Magistrat du district de Montréal, avant le désaveu de la loi en vertu de laquelle cette Cour avait été établie. Après le désaveu, le 5 septembre, le demandeur a filé une discontinuation, et a pris une action devant cette Cour. Le défendeur fait motion que tous les procédés en cette cause, soient suspendus jusqu'à ce que le demandeur ait payé les frais qu'il a encourus devant la Cour de Magistrat du district de Montréal.

La question est de savoir si cette Cour peut décider si des frais ont été encourus dans la Cour maintenant disparue, avant la discontinuation.

La Cour a jugé qu'elle n'avait pas de juridiction.

Motion renvoyée.

Loranger & Labine, avocats du demandeur.

Chs. Raynes, avocat du défendeur.

(J. J. R.)

COUR DE MAGISTRAT.

MONTREAL, 13 mai 1889.

Coram CHAMPAGNE, J. C. M.

VALLÉE V. CAUNON.

Patron et ouvrier—Salaire—Billets de travail—Convention.

Jugé:—Qu'une personne qui emploie des ouvriers à l'heure et leur donne un billet marquant le nombre d'heures faites au lieu de tenir des livres, et ensuite les paie le samedi suivant les billets présentés, ne peut pas refuser le paiement du temps fait, parce que l'ouvrier aurait perdu ses billets; il en serait autrement, si l'on prouvait une convention formelle entre le patron et l'ouvrier que le paiement ne se ferait que sur présentation des billets; une entente tacite ou une coutume n'est pas suffisante.

PER CURIAM.—Le demandeur a travaillé 24 heures à 25 centins de l'heure, au déchargement des navires pour le compte du défendeur, et demande le paiement de son salaire. Le défendeur répond qu'il ne tient pas de livres pour le temps de ses hommes, que tous les soirs il leur donne des tickets signés de son nom constatant le nombre d'heures de travail de chaque homme, et qu'il ne peut payer que sur la présentation de ces tickets,

et qu'en payant le demandeur qui dit avoir perdu ses tickets, il s'expose à payer deux fois, dans le cas où les tickets seraient présentés plus tard par une autre personne. L'ouvrage et le prix sont admis. Il est prouvé que d'autres compagnies du même genre donnent aussi des tickets pour la satisfaction des employés, mais qu'ils tiennent en même temps des livres pour le temps des hommes. Le demandeur ne peut perdre son salaire dans la crainte que les tickets seront présentés par d'autres personnes, ce qui n'arrivera peut-être jamais. Ces tickets ne sont pas faits au porteur, ni pour valeur reçue, ce qui obligerait l'étranger qui les présenterait de prouver que le temps a été donné comme valeur de ces tickets. Si le défendeur n'a pas d'autres moyens de constater le temps donné par ses employés, c'est sa faute, il devrait tenir des livres pour le temps de ses hommes; il en serait autrement, si le demandeur avait accepté ces tickets avec l'entente qu'il ne serait pas payé s'il ne les rapportait.

Jugement pour le demandeur.

David, Demers & Gervais, avocats du demandeur.

J. Cloran, avocat du défendeur.

(J. J. R.)

DECISIONS AT QUEBEC. *

Secrétaire-trésorier des commissaires d'école—Obligation de remettre livres, etc., en cas de destitution—Pénalité—S. R. Q. 2198 et seq.

*Jugé:—*1o. Un secrétaire-trésorier d'une municipalité scolaire qui a été destitué de sa charge n'encourt pas la pénalité portée en l'article 2198, S. R. Q., par son refus de porter les archives et objets dont il était dépositaire chez son successeur, lorsque ce dernier demeure dans la municipalité voisine et n'a pas de bureau dans la municipalité scolaire;

2o. Mais il est tenu de remettre ces objets à son successeur, sans avis préalable, lorsque l'occasion lui en est offerte, *v.g.*, lorsque le successeur se présente chez lui après la destitution à deux reprises, comme en cette cause, et sa négligence de le faire donne ouverture à l'action en demande de remise pré-

vue par l'article 2199, S. R. Q. (*Dissentiente*, Andrews, J.);

20. Ce dernier article permettant de conclure dans une même action à ce que le défendeur soit condamné à faire cette remise et à payer la pénalité de l'article 2198, le tribunal peut, en rejetant cette dernière partie des conclusions, accorder l'autre et statuer sur les frais en conséquence.—*Quimet v. Mignault*, en révision, Casault, Plamondon, Andrews, JJ., 31 oct. 1889.

Contract—Illegal consideration—Public Policy—Fees of office.

Held:—The consideration of a contract between two persons appointed jointly to a public office, that one of them shall receive all the fees and emoluments attached to it and pay a salary to the other, is contrary to public policy and illegal, and the contract itself is therefore void.—*Remillard v. Trudelle*, Andrews, J., S. C., 1889.

Communauté—Droits de la femme commune en biens—C. C. Art. 1292, Cout. de Paris, Art. 225.

Jugé:—10. Le mari comme chef de la communauté n'est pas simplement l'administrateur des biens qui la composent; il en est le maître absolu et peut en disposer comme bon lui semble, quelque soit leur provenance, même s'ils ont été acquis par l'industrie de la femme pendant son absence;

20. La femme commune ne peut être considérée comme un associé; tant que la communauté subsiste son droit est informé, absorbé dans la toute puissance du mari et subordonné à l'événement de son acceptation après la dissolution. Elle ne peut partant demander, même avec l'autorisation de la justice, la rescision de l'aliénation des biens communs faite par le mari; son seul recours, dans les cas de fraude, est la demande en séparation de biens.—*Bernier v. Groulx*, en révision, Casault, Andrews, Larue, JJ., 31 oct. 1889.

Steamers meeting in the river St. Lawrence—Curve in channel—Rule of the Road.

Held:—When two, steamers meet in the river St. Lawrence at a place where a pro-

jection or point on the north shore has a corresponding bend in the channel, the descending vessel has no right to infer that the upward bound vessel is angling across the river, and will not pass port side to port side, from the fact that, while keeping to her own side of the fair-way, the curve causes her to show her starboard side.—*Allan v. Reford*, Vice-Admiralty Court, Irvine, J., Nov. 1889.

QUEEN'S BENCH DIVISION.

LONDON, Dec 3, 1889.

REGINA V. COWPER.

Lithographed endorsement of Solicitor's name.

A plaintiff in a County Court issued a summons by his solicitor in an action for debt, the particulars endorsed thereon being 2l. 16s. 5d. debt, 4s. Court fees, and 4s. solicitor's costs.

The name and address of the solicitor were lithographed on the particulars, which were not otherwise signed by the solicitor. The summons was heard by the registrar, when it appeared that the defendant had on the day preceding the hearing paid into Court 3l. 0s. 5d. The plaintiff's solicitor therefore applied for an order for payment of the balance which the registrar held to be the amount claimed in respect of the solicitor's costs, and refused to make the order, on the ground that, the particulars not being signed, these costs could not be recovered, and referred the matter to the judge. The case was heard by the deputy-judge, who upheld the decision of the registrar, and the summons was struck out. The plaintiff thereupon obtained a rule calling upon the deputy-judge to show cause why he should not hear and determine the matter.

By Order VI., rule 10, of the County Court Rules, 1889, the solicitor must 'endorse' on the particulars his name, &c., otherwise the costs of entering the plaint shall not be allowed; and, in the scale of costs set out in the schedule, costs are only allowed where the particulars are signed by the solicitor.

The COURT (LORD COLERIDGE, C.J., and MATHEW, J.) held that the order and the schedule together provided that the particulars should be signed by the solicitor, otherwise the costs should not be allowed, and

that a lithographed endorsement was not a signature within that provision; and that, therefore, the decision of the deputy County Court judge was right, and the plaintiff was not entitled to recover.

Rule discharged.

SENTENCES ON PRISONERS.

There has been much correspondence on the method of sentencing prisoners adopted by the Recorder of Liverpool. The principle which he adopts in regulating his sentences is to proportion the punishment to the offence, and not to give outrageous sentences, which strike with horror those who hear them for the first time, but gradually become natural and tolerable to those who hear them frequently. The reason for advocating this principle was the effect that such punishments had upon the moral nature of the criminal, it being stated that a woman who had been leniently sentenced after several previous heavy terms of imprisonment had not troubled the Recorder's Court again. Sir Henry James, in commenting on lengthy sentences, endeavoured to show that the Recorder's address was in reality a call to society to arouse itself and prevent the recurrence of lengthy barbarous punishments. He stated that he was confident that the action of the Recorder would establish that even the most hardened criminals could be more influenced for good by being afforded opportunities of amendment than by receiving severe sentences, now so often imposed. It is suggested that a Court for the review of sentences should be established, and be within the reach of all. The Lord Chief Justice has also expressed concurrence with the Liverpool Recorder's views. On the other hand, the Recorder of Manchester, Mr. Yates, referring to the question of short *versus* long sentences, said he could not altogether agree with the Recorder of Liverpool in his recent remarks. In passing sentence, he (Mr. Yates) thought that the past life and conduct of the offender should be taken into consideration, whether, if previously convicted, he had tried to amend, or had committed a new crime as soon as he came out of prison.

While he set his face against anything like vindictiveness, he thought, above all, the public should be protected, and the circumstances of each case carefully considered. It was easy to assume the part of critic, but those charged with the administration of the law ought not to forget that the claim of duty was the highest of all.—*Law Journal*.

Lord Chief Justice Coleridge has addressed the following letter to a correspondent who drew his lordship's attention to Judge Hopwood's address to the grand jury of Liverpool advocating light sentences to prisoners, and asserting that the meting out of justice and mercy with discretion had had most beneficial effects in reducing the violence of many prisoners and the seriousness of their crimes: '1 Sussex Square, London, W., Jan. 18. Sir,—I thank you for the paper. Without pledging myself to details, I think that Mr. Hopwood's principles of punishment are certainly right.—Your obedient servant, COLERIDGE.'

CRIMINAL LAW—VIOLENCE OF HUSBAND.

In *Reg. v. Halliday*, 51 L. T. Rep. (N. S.) 701, before Lord Coleridge, C. J., Mathew, Cave, Day and Smith, JJ., in order to escape from the violence of her husband, who had used threats to his wife, amounting to threats against her life, the wife got out of a window, and in so doing fell to the ground and broke her leg. The husband was convicted of having willfully and maliciously inflicted grievous bodily harm on his wife. *Held*, correct. Lord Coleridge, C. J., said: "I am of opinion that the conviction in this case is correct, and that the sentence should be affirmed. The principle seems to me to be laid down quite fully in *Reg. v. Martin*, 8 Q. B. Div. 54; 14 Cox C. C. 633. There this court held that a man who had either taken advantage of or had created a panic in a theatre, and had obstructed a passage, and had rendered it difficult to get out of the theatre, in consequence of which a number of people were crushed, was answerable for the consequences of what he had done. Here the woman came by her mischief by getting

out of the window—I use a vague word on purpose—and in her fall broke her leg. Now that might have been caused by an act which was done accidentally or deliberately, in which case the prisoner would not have been guilty. It appears from the case however that the prisoner had threatened his wife more than once, and that on this occasion he came home drunk, and used words which amounted to a threat against her life, saying, 'I'll make you so that you can't go to bed;' that she, rushing to the window, got half out of the window, when she was restrained by her daughter. The prisoner threatened the daughter, who let go, and her mother fell. It is suggested to me by my learned brother, that supposing the prisoner had struck his daughter's arm without hurting her, but sufficiently to cause her to let go, and she had let her mother fall, could anyone doubt but that that would be the same thing as if he had pushed her out himself? If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result. I think that in this case there was abundant evidence that there was a sense of immediate danger in the mind of the woman, caused by the acts of the prisoner, and that her injuries resulted from what that sense of danger caused her to do." The other judges concurred.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, March 8.

Judicial Abandonments.

Narcisse Edouard Morissette, dry goods dealer, Three Rivers, March 3.

Curators appointed.

Re Théop. Alain.—C. Desmarceau, Montreal, curator, March 4.

Re Charles Beaulieu, tailor, Quebec. —H. A. Bedard, Quebec, curator, March 1.

Re Zephirin Champoux, St. Sylvere, Kent & Turcotte, Montreal, joint curator, March 1.

Re Marie Louise Picault (J. N. T. Lafrcain & Co.), St. Ambroise de Kildare.—Kent & Turcotte, Montreal, joint curator, Feb. 27.

Re Ephrem Durocher et al.—A. F. Gervais, St. John's, curator, Feb. 28.

Re John Griffith, Carmel.—Kent & Turcotte, Montreal, joint curator, March 5.

Re Joseph Lavallée, founder, St. Charles.—J. Morin, St. Hyacinthe, curator, March 3.

Dividends.

Re Fraserville boot and shoe Co.—Dividend, payable March 13, F. Gourdeau, Quebec, liquidator.

Re John Burns, Montreal.—First dividend, payable March 25, W. A. Caldwell, Montreal, curator.

Re J. A. Coté, St. Wenceslas.—Dividend, payable March 26, Kent & Turcotte, Montreal, joint curator.

Re William M. Fuller, Montreal.—First and final dividend, payable March 25, W. A. Caldwell, Montreal, curator.

Re Edmond Labelle, Montreal.—First and final dividend, payable March 25, Kent & Turcotte, Montreal, joint curator.

Re M. Lepage, St. Tite.—First and final dividend, payable March 25, Kent & Turcotte, Montreal, joint curator.

Re J. O. Massicotte.—First and final dividend, payable March 25, C. Desmarceau, Montreal, curator.

Re George White McKee, Coaticook.—First and final dividend, payable March 25, W. A. Caldwell, Montreal, curator.

Re Morency & frère.—Second and final dividend, payable March 24, G. O. Taschereau, St. Joseph Beauce, curator.

Re J. P. Morin, Stanhope.—Dividend, payable March 26, Kent & Turcotte, Montreal, joint curator.

Separation as to property.

Elise Boisvert vs. Joseph Edouard Martin, saddler, Louiseville, Feb. 20.

GENERAL NOTES.

LEGACY.—The late Mr. Justice Manisty left his clerk a legacy of £2500.

TRADE MARK.—A trader cannot, in the absence of fraud, be restrained from adopting as his trade or business name his own name if trading alone, or his own in combination with those of his partners, merely because the name so adopted may, by its similarity with that of another, make it probable that inconvenience may arise, and the goods of one trader be bought by mistake for those of the other.—(*Thomas Turton & Sons v. John Turton & Sons*, 58 Law J. Rep. Chanc. 677).

BACK HAND.—An English journal says:—"Lord Justice Cotton and his two colleagues in Court of Appeal No. 2 experienced grievous annoyance from the peculiar handwriting of a document placed before them for perusal on Monday last. The peculiarity consisted in the fact that the words and letters were written sloping backward to the left instead of being sloped in the usual manner. Without seeing a document so written, it is hard to realize its unpleasant effect on the eye. The strictures of the learned judges on this unusual caligraphy almost amounted to a threat of pains and penalties on the offender."

The Legal News.

VOL. XIII. MARCH 22, 1890. No. 12.

FIRE INSURANCE — LOSS, IF ANY, PAYABLE TO THIRD PARTY.

In vol. 3, p. 25, of this work, reference was made to the decision of the Court of Appeal in *Black & National Insurance Co.*, 3 Leg. News, 29; 24 L. C. J. 65. In that case it was held, by a majority of the Court, that where a policy, taken out by the owner of real property, declares that the loss, if any, is payable to certain persons named as mortgagees to the extent of their claim, such persons become thereby the parties assured to the extent of their interest as mortgagees, and their rights and interests cannot be destroyed or impaired by any act of the owner of the property. Mr. Justice Ramsay, who was one of the dissentient judges, described this decision as not compatible with any sound principle. "It alters the obligation of the insurer, and exposes him to perils which the contract he has entered into, on its face, does not contemplate."

As the decision above referred to was a reversal, and there were two dissentients, authority on the point was pretty evenly divided, Justices Mackay, Monk, and Ramsay being in favor of the insurer, and Chief Justice Dorion and Justices Tessier and Sicotte being in favor of the mortgagee.

Nearly ten years later the question has again presented itself in *National Assurance Co. of Ireland & Harris*, M. L. R., 5 Q. B. 345. Here the loss, if any, was made payable to a person named in the policy, and it was held that the rights of this person were not affected by acts of the insured which would have the effect of voiding the contract as regards the insured, such as an assignment of the property without the permission of the insurer. It was also held that the creditor to whom the loss was payable might make the preliminary proof of loss in his own behalf, notwithstanding a stipulation in the

contract that the proof of loss should be made by the insured although the loss should be made payable to a third party.

This judgment, which was made to rest upon *Black & National Ins. Co.*, extends and broadens the scope of the earlier decision. It would appear that the fact of a company consenting to an assignment of the loss, is equivalent to a renunciation on its part of all the conditions of the policy. For example, the property insured may be assigned to some one whom the company would have utterly refused to insure, but the company has no redress during the remainder of the period for which the premium has been received. The property may be converted from a dwelling into a saloon, but the contract holds good. To use Mr. Justice Ramsay's words, the obligation of the insurer is altered, and he is exposed to perils which the contract he has entered into, on its face, does not contemplate.

The equal division of opinion on the former case was pointed out. This equality is still more marked when the two cases are taken together. The vote stands thus: For the insurer:—Justices Mackay, Monk, Ramsay, Cross, Doherty, 5. Against the insurer:—Chief Justice Dorion, and Justices Tessier, Bossé, Papineau and Sicotte, 5. It happens that the French-speaking judges have all gone the one way and the English-speaking the other. The amount involved in *National Assurance Co. & Harris* was too small to give a right of appeal either to the Supreme Court or to the Judicial Committee of the Privy Council. It seems very strange, however, seeing the importance of the question, and the remarkable division of opinion above noted, that an effort has not been made to bring the case before the Judicial Committee of the Privy Council. There is every reason to suppose that on a presentation of the facts here stated, special leave to appeal would readily have been granted by the Judicial Committee. As the matter now rests, a very important question is governed only by the accidental decision of an intermediate tribunal, the ten judges who have pronounced upon it standing precisely five to five.

COUR SUPÉRIEURE.

SAGUÉNAY, sept. 1888.

Coram ROUTHIER, J.

REGINA V. DENNISTOUN et al. (15 Q. L. R. 353.)

*Concession de Fief—Titre originaire détruit—
Preuve secondaire—Promesse de concession
suivie de possession—Acte de foi et hom-
mage—Cadastrés des seigneuries—
Étendue et limites.*

Jugé :—10. La concession d'un fief par la couronne de France, au Canada, en 1661, est un fait dont la preuve est soumise aux règles ordinaires, et la preuve secondaire en est admise lorsqu'il est constaté que le titre originaire de concession, et les registres où il était consigné, ont été détruits par des incendies ;

2. Sous l'ancien droit, la promesse par l'autorité compétente d'une concession de seigneurie, suivie de possession par celui à qui elle était faite du territoire auquel elle se rapportait, équivalait à une concession régulière ;

30. Avant l'abolition de la tenure seigneuriale, l'acte de foi et hommage reçu et signé par le Gouverneur de la Province, était une preuve *primâ facie* que le territoire auquel il se rapportait avait été antérieurement concédé à titre de seigneurie ;

40. Les cadastrés des seigneuries faits en vertu de la section 16 de l'acte seigneurial de 1854, constatent aussi bien les droits de la couronne que ceux des seigneurs et des censitaires, et peuvent être invoqués contre elle aussi bien que contre ces derniers ;

50. En déterminant l'étendue ou les limites d'une concession dont l'existence est établie par une preuve secondaire, il faut rechercher les divers sens dont les noms de lieux mentionnés dans les documents produits sont susceptibles, et tenir compte des circonstances telles que les connaissances topographiques que possédaient les parties contractantes, les endroits où les concessionnaires ont fait des établissements, etc.

COUR DE MAGISTRAT.

MONTREAL, 21 juin 1889.

Coram CHAMPAGNE, J. C. M.

Dlle CHEVALIER V. BEAUSOLEIL.

Dépôt volontaire—Responsabilité.

Jugé :—10. Qu'une servante qui quitte le service de son maître et laisse en partant sa valise à la maison de ce dernier, fait un dépôt volontaire, et dans ce cas, le dépositaire n'est responsable de la perte de la valise que si elle a lieu par sa faute et sa négligence.

20. Que la preuve de faute et négligence incombe au demandeur.

PER CURIAM :—La demanderesse qui était au service du défendeur lui demande en partant la permission de laisser sa valise chez lui pour quelque temps ; le défendeur après lui avoir dit d'enlever sa valise et ses effets, a consenti néanmoins à ce que la valise reste chez lui. Quelques semaines après, la demanderesse a retrouvé sa valise à St-Henri, mais il manquait une grande partie de son contenu dont elle réclame maintenant la valeur.

La preuve ne fait pas voir comment la valise est partie de chez le défendeur.

Ce dépôt était volontaire, le défendeur ne peut, en conséquence, être tenu responsable de la perte des effets qu'en autant qu'elle aurait été occasionnée par sa faute et négligence. La preuve ne montrant nullement à qui la faute, le défendeur n'est pas responsable.

Autorités : C. C. 1804 ; Pothier, Dépôt, Nos. 43, 44 ; 14 de Lorimier sur l'article 1804.

Action déboutée.

J. M. Mireault, avocat de la demanderesse.
Mercier, Beausoleil, Choquette & Martineau
avocats du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 21 juin 1889.

Coram CHAMPAGNE, J. C. M.

RACETTE et al. v. DESMARTEAU.

Clause pénale—Preuve.

Jugé :—Que lorsqu'il s'agit de donner effet à une clause pénale, la preuve de la violation de cette clause est rigoureuse et ne doit laisser aucun doute.

PER CURIAM :—Les demandeurs par contrat écrit se sont engagés à faire pour le défendeur une certaine quantité de briques, à tant par mille briques, avec condition expresse que les demandeurs paieront au défendeur

une pénalité de \$5.00 par jour, pour chaque jour qu'ils négligeront de faire de la brique.

Les demandeurs auxquels il est dû au delà de \$40.00 prennent une saisie-arrest avant jugement.

Le défendeur nie qu'il y ait eu lieu à prendre contre lui une saisie-arrest avant jugement, et ajoute, en outre, que le montant réclamé par l'action est compensé par les amendes que les demandeurs doivent lui payer pour les jours qu'ils ont négligé de faire de la brique.

La preuve ne justifie pas la saisie-arrest avant jugement, et plusieurs témoins déclarent que les demandeurs ont perdu du temps par la faute du défendeur; sur ce point la preuve est contradictoire. Lorsque la preuve est contradictoire, au sujet d'une clause pénale, il faut donner le bénéfice du doute à la partie qui s'est obligée. Les demandeurs ne pourraient être condamnés à payer cette pénalité que dans le cas où il serait établi hors de doute qu'ils ont forfait à leur contrat par leur faute.

Saisie-arrest avant jugement cassée.

Jugement pour les demandeurs sur l'action.

Ehler & Pelletier, avocats des demandeurs.

Lavallée & Lavallée, avocats du défendeur.

(J. J. B.)

APPOINTMENT OF QUEEN'S COUNSEL.

In the House of Commons, March 18, Mr. Amyot said:—A question of importance now agitates the public, especially the legal portion of it, and is of a nature to cause trouble. There seems to be a conflict of jurisdiction in regard to the appointment of Queen's Counsel, between the Federal and Local Governments. The object of my motion is to elucidate that prerogative, which also includes other questions vital to the Confederation at large. It is an important one, not only as far as the etiquette in the courts is concerned, but it may involve serious consequences. The criminal law provides that the Crown Prosecutor shall have the right to reply, in addressing the jury, when he is a Crown Counsel. The wrong application of this rule may occasion new trials, writs of

error, cause heavy expenses, undue delays in the administration of justice. We all know what were the Queen's Counsel in England. "A custom, says Blackstone, (Vol. III, page 354) has, of late years, prevailed of granting letters patent of precedence to such barristers as the Crown thinks proper to honor with that mark of distinction; whereby they are entitled to such rank and precedence as are assigned in their respective patents." These counsel, in England, are appointed by the executive power. It is one of the prerogatives of the Crown. The same practice obtained here, and, up to Confederation, those appointments could not give rise to any difficulty. Even after the Confederation, no difficulty arose until the Supreme Court delivered its judgment, in 1874, in the case of *Lenoir v. Ritchie*. Up to that time, nobody denied the right of the Local Legislatures to appoint Queen's Counsel for their courts. The Supreme Court of Canada, in the case cited, decided that the Local Legislatures had no such power. Their judgment rests on the following syllogism: (1) The appointment of a Queen's Counsel is a royal prerogative, and can only be made in the Queen's name; (2) The Queen does not form part of the Local Legislatures, but only of the Federal Parliament; (3) Hence, to the Ottawa Government alone belongs the appointment of the Queen's Counsel. No appeal to Her Majesty's Privy Council was taken from that decision; which has perplexed the mind of the legal community ever since, and embarrassed the divers Governments of the Dominion. That judgment was concurred in by only three of the honorable judges of the Supreme Court; the Chief Justice was not present; one of the sitting judges pronounced that the Provinces had the right to appoint Queen's Counsel, and another would not give any opinion, because the question did not arise. The only question in dispute was whether an appointment of Queen's Counsel made by a statute of Nova Scotia in 1876, had a retroactive effect, and gave to the new title-holders precedence over the counsels appointed by the Ottawa Ministry since 1867. That was the only point discussed at the argument by Mr. Haliburton, representing the Govern-

ment of Nova Scotia, and he declared that the constitutional question had not been raised before the inferior court, that he did not expect it would be raised, that he did not intend to discuss it, and that he was not prepared to do so. None of the provinces had received notice, or knew that such an important question would be raised, and none was represented. This question was not the one dependant upon the issue, although this *ex parte* judgment, on a collateral issue not in point, given by a divided tribunal, without hearing the interested parties, has sufficed to reverse all precedents; to annul, virtually, all the local statutes passed; to supersede all the deliberate opinions, formally expressed, by the law officers of England, as well as by those of the Dominion. I might here quote the correspondence exchanged between the right hon. leader of this House and Lord Kimberley. After having quoted section 92, paragraph 14, of the British North America Act, omitting therefrom the word "exclusively," he says:

"Under this power, the undersigned is of opinion that the Legislature of a Province, being charged with the administration of justice and the organisation of the courts, may, by statute, provide for the general conduct of business before those courts; and may make such provision with respect to the bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of precedence as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation."

Lord Kimberley answered, on the 1st February, 1872, very politely confirming or accepting the views taken and submitted to him by the right hon. the Premier:

"I am advised, he says, that the Governor General has now power, as Her Majesty's representative, to appoint Queen's Counsel, but that a Lieutenant Governor, appointed since the Union came into effect, has no such power of appointment. I am further advised that the Legislature of a Province can confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel; and with respect to precedence or precedence in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor General and the Lieutenant Governor, as above explained."

I must protest against those *ex parte* cases

submitted to the Home Government. In all such instances, the interested parties, the Provinces, should be invited to join and submit their own views in a joint case. I will not discuss the question as to whether a statute is necessary or not, to authorise the exercise of the royal prerogative in appointing the Queen's Counsel. Before the Union, even before Confederation, I know of no Quebec statute providing for those appointments, which, however, were freely made by the representative of the Crown, advised by his counsel as exercising a royal prerogative. The authorities in Canada appointed them by virtue of the public law of England, which became for us the common law of the land by the cession of this country to England. The more important point which I want to elucidate is this one: Does the Queen form part of the local Governments? If she does not, the appointments of magistrates, coroners, justices of the peace, sheriffs, gaolers, constables, and hundreds of others are null, because every one of these appointments is equally of royal prerogative: the Queen being the source, the fountain of all honors and powers. More than that, all our local statutes would be void, because they are all enacted by "Her Majesty, with the advice," etc. In the beginning of the Confederation, the dual mandate existed. I see here hon. members who were present when the first of those statutes was enacted for the Province of Quebec, it might even have been at their suggestion that the first statutes were so phrased. None of those statutes have ever been disallowed for such phraseology. Have all the public and leading men of Canada, all the judges, all the Bar of the Dominion been so long in error on such a point? Some of our statutes have been discussed before the Privy Council. Never has it occurred to the mind of any one that they were wrongly enacted. But let us examine the law more closely. By the 31st Geo. III (1791), chapter 31, section 2, it is provided:

"That there shall be within each Province of Upper and Lower Canada a Legislative Council and an Assembly to make laws, etc., and that such laws will be assented to by His Majesty or in His Majesty's name, by such person as His Majesty shall, from time to time, appoint to be the Governor or Lieutenant-Governor of such Province."

By section 30, the Governor or Lieutenant Governor is :

"Ordered to assent to the Bills in His Majesty's name."

The same Act provides for the establishment of the Courts by the Canadian Legislature. The 3rd and 4th Vict. (1840), chapter 35, section 3, again prescribes :

"That the laws of the United Canadas shall be assented to in Her Majesty's name by the Governor. Section 40 provides that the Lieutenant-Governor may receive the same powers as the Governor General."

The same Act declares that all the existing laws shall remain in force, specially as to the administration of affairs by the Executive Council, it gives power to create courts, etc. Section 61 is very explicit. It reads as follows :—

"And be it enacted, that in this Act, unless otherwise expressed therein, the words, 'Act of the Legislature of the Province of Canada,' are to be understood to mean, 'Act of Her Majesty, her heirs or successors, enacted by Her Majesty, or by the Governor on behalf of Her Majesty, with the advice and consent of the Legislative Council and Assembly of the Province of Canada;' and the words, 'Governor of the Province of Canada,' are to be understood as comprehending the Governor, Lieutenant-Governor, or person authorised to execute the office or the functions of Governor of the said Province."

Such was the law when the Confederation Act was passed. Not only was the Governor or Lieutenant-Governor allowed, but he was bound to act in the name of the English Sovereign. Nothing has been changed by the British North America Act in that respect. Section 129 says :—

"Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia and New Brunswick at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all affairs, judicial, administrative and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick, respectively, as if the union had not been made."

So the duty of the Governors or Lieutenant-Governors, the obligation by them to assent to the Bills, to act in the name of the Queen, remained in force, for such was then the law of the land. Now, let us see for the executive or administrative power. Section 69 :—

"All powers, authorities and functions which, under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada,

Lower Canada, or Canada, were, or are, before or at the union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice or with the advice and consent of the respective Executive Councils thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the union in relation to the Government of Ontario and Quebec, respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec, respectively, with the advice or with the advice and consent of, or in conjunction with the respective Executive Councils or any members thereof, or by the Lieutenant-Governor individually, as the case requires . . .

Section 88 applies virtually the same principles to Nova Scotia and New Brunswick. Section 12 applies the same rule to the Governor-General. So it is clear, obvious, undeniable that the right and obligation of the Governor and Lieutenant-Governors to act in the name of the Sovereign remained, by the British North America Act, the same as they were before. Let us now see more closely the mechanism of government introduced by the Confederation Act. Each Province had, at the dawn of Confederation, its rights of self-government confirmed by the British Parliament. Each Province kept some parts of those rights, and consented to some other parts being delegated and transferred to a general Parliament and an executive responsible to the people of the new Dominion. A Parliament and Executive for the whole Dominion were created; the two Canadas were separated *de novo*, forming each a separate Province, and each Province of the Dominion was provided with a Parliament and Executive of its own. So as to avoid confusion, different names were given to each. By section 17, the legislative body for the Dominion is called the Parliament, and it consists of the Queen, the Senate and the House of Commons. This differs from the appellation of the Government of the United Kingdom, wherein the corresponding branches of the Parliament are called "The Queen's Most Excellent Majesty, the Lords Spiritual and Temporal, and the Commons." For the Executive body the words chosen (sec. 11) were "Queen's Privy Council for Canada." Section 9 provides that the executive government and authority of and over Canada shall continue to be vested in the Queen, but section 10 provides that the chief of the Execu-

tive shall administer "in the name of the Queen." *De facto* it is the Governor or his representative who administers. We substitute the word "Queen." It is a mere fiction of the law. The Queen never signed any of our laws, our proclamations, our official documents. Any other word than "Queen" might have been chosen to designate the chief of the Executive. The result would not have been changed; the laws and acts of the Executive would have been equally valid, in virtue of the powers conferred upon us by the British Parliament. That the chief of the "Queen's Privy Council for Canada" only acts in the name of the Queen is made again very clear by section 55, which says:—

"Where a Bill passed by the House of Parliament is presented to the Governor-General for the Queen's assent, he shall declare either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the Bill for the signification of the Queen's pleasure."

For the Provinces, other words were chosen to designate the divers powers. So the legislative body, instead of being called Parliament, was termed "Legislature"; the expression "Lieutenant-Governor" was substituted for "the Queen"; the expression "Legislative Council" was substituted for the "Senate," the Upper House; and the expression "Legislative Assembly" was substituted for "Commons," the Lower House. (Sections 69 and 71.) As to the administrative power, the words "Executive Council" were adopted instead of "Queen's Privy Council." (Section 63.) The Queen, acting with the advice of her own council, might have kept the right of appointing herself the Lieutenant-Governors. She delegated that power to the Governor appointed by her, acting in her name. When once appointed, by virtue of that authority, a Lieutenant-Governor, within the limit of his attributions, represents the Queen as fully as the Governor-General also acting within the limits of his attributions. He derives his powers directly from the Queen, through the Governor her mandatory. It is of common and universal law that the acts of the mandatory bind his principal. Both the Governor and Lieutenant-Governors have the same powers, under different names, in different fields of action, with jurisdiction on different subjects and

matters. They all take the same oath (section 61). The members of the Privy Council are sworn as such (section 11). The members of the Executive Councils are sworn as they were before the Union (sections 64 and 135). By comparing sections 12 and 65, it is easy to ascertain the identity of powers of the Privy Council and of the Executives, each within the limits of the attributions conferred by the British North America Act. By these quotations, it is easy to see that the Queen forms part of the local executives and legislatures as well as of the Privy Council and Parliament of Canada. The names and appellations are changed, but the effect remains the same. The principle that the Queen forms part, virtually, by fiction of the law, of every Parliament of her colonies, has been broadly laid down as far back as 1774, in a case of *Hall v. Campbell*, in which Lord Mansfield, delivering the unanimous judgment of the Court of King's Bench, decided that the King had no power, by letters patent, to impose duties on the Island of Grenada. He said:

"We therefore think that, by the two proclamations and the commission to Governor Belleville, the King had immediately and irrevocably granted to all who were and should become inhabitants, or who had or should acquire property in the Island of Grenada, or, more generally, to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the Governor and council, in like manner as the other islands belonging to the King."

And further on, he says:

"To use the words of Sir Philip Yorke, Sir Clement Wearge, it can only now be done by the assembly of the Island, or by an Act of the Parliament of Great Britain."—(1 Cowper's Reports, page 213.)

The Supreme Court of Canada, in deciding that the Queen did not form part of the Local Legislatures, doubtless overlooked the then recent decision of Her Majesty's Privy Council, in the case of *Théberge v. Landry*, decided in 1876, in which Lord Cairns, delivering the unanimous judgment of the court, and speaking of the Quebec Controverted Elections Act, called it "an Act which is assented to on the part of the Crown, and to which, therefore, the Crown is a party." (Law Reports, Appeal Cases, 2, 1876-1877, page 108.) In the case of the *Queen v. Coate*, the Privy Council had

decided, in 1873, that the Quebec law appointing fire marshals with power to investigate, swear witnesses and commit to gaol, was within the competency of the Province. (1st Cartwright, page 97.) In fact, there is no possible law, in any dependency of England, as well as in England itself, without the Governor-General being a party to it; the same principle applies to the Executive powers. Authorities on that point are innumerable:

"The constituent parts of Parliament are, the King, the House of Lords and the House of Commons.—(Stephens: The Rise and Progress of the English Constitution, page 531.)

"The first prerogative of the King, in his capacity of supreme magistrate, has, for its object, the administration of justice. 1st. He is the source of all judicial power in the state: he is the chief of all the courts of law, and the judges are only his substitutes; everything is transacted in his name; the judgments must be with his seal, and are executed by his officers. 2nd. By a fiction of the law, he is looked upon as the proprietor of the Kingdom. 3rd. The second prerogative of the King is, to be the fountain of honor.—(Stephens: The Rise and Progress of the English Constitution, page 536.)

"A Bill does not become an Act of Parliament until it has received the Royal assent."—(Cox: Institutions of the English Government, page 48.)

"In other cases, Parliament has expressly delegated to the Colonies a power of making laws for their own internal economy."—(Cox: Institutions of the English Government, page 10.)

"That the several enactments of Parliament should receive the Royal assent, will appear very clearly, if we consider the nature of the Coronation oath."—(Cox: Institutions of the English Government, page 51.)

"No doubt the assent of the Governor is needed, in order to turn Colonial Bills into laws; and further investigation would show our enquirer that, for the validity of any Colonial Act there is required, in addition to the assent of the Governor, the sanction, either expressed or implied, of the Crown."—(Dicey: Lectures on the Constitution, page 96.)

"The King is a constituent part of the supreme legislative power."—(1 Blackstone, page 256.)

"The making of statutes is by the King with the assent of Parliament." (Bacon's Abr. tit. Prerogative, 497.)

"The King has the prerogative of giving his assent, as it is called, to such bills as his subjects, legally convened, may present to him, that is, of giving them the force and sanction of a law."—(Bacon's Abr. tit. Prerogative, 499.)

"No Acts of Colonial Legislatures have force until they have received either the assent of the Governor in the Queen's name, or the Royal assent when reserved and transmitted for consideration."—(Cox's British Commonwealth, 525.)

What is true of the legislative power, is equally true of the executive and judicial powers. The Queen is the fountain of all power.

"All jurisdiction exercised in these kingdoms, that are in obedience to our King, is derived from the Crown; and the laws, whether of a temporal, ecclesiastical, or military nature are called his laws; and it is his prerogative to take care of the due execution of them. Hence, all the judges must derive their authority from the Crown, by some commission warranted by law, and must exercise it in a lawful manner, and without any the least deviation from the known and stated forms.

"So although the King is the fountain of justice and entrusted with the whole of the executive power of the law, yet he hath no power to change or alter the laws which have been received and established in these Kingdoms: for it is by those very laws that he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner do they declare and ascertain the rights and liberties of the people."—(VL Bacon's abridgement, page 423.)

"Privy Councillors are made by the King's nomination."—(Cox, page 298.)

"The King is said to be the fountain of justice, *fons justitiæ*; and in that capacity has the right of erecting courts of judicature, though the right is subjected to many restrictions by Acts of Parliament. All jurisdictions of courts of justice are either mediately or immediately derived from the Crown; their proceedings were generally in the name of the Sovereign, and are executed by ministerial officers of the Crown."—(Cox, page 300.)

"Another capacity in which the Sovereign is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the Kingdom. By the fountain of justice the law does not mean the author or origin, but only the distributor. Justice is not derived from the Sovereign, as from his free gift; but he is the steward of the public, to dispense it to whom it is due. The original power of judicature, by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the Sovereign or his substitutes. He, therefore, has alone the right of erecting courts of judicature; for, though the Constitution of the Kingdom has entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is consequently necessary that courts should be erected, to assist him in executing this power; and equally necessary that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the Crown, their proceedings run generally in the Sovereign's name, they pass under his seal, and are executed by his officers."

"But at present, by the long and uniform usage of many ages, our Sovereigns have delegated their whole judicial power to the judges of their several courts * * *"—(1 Blackstone, page 261.)

(To be continued.)

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, March 15.

Judicial Abandonments.

Narcisse Edouard Cormier, lumber merchant, Aylmer, March 11.

George Darveau, merchant, Quebec, March 13.

Josephine Valade, doing business as J. Hénault & Co., Montreal, March 3.

William A. Douglas, township of Chatham, district of Terrebonne, March 7.

Stanislas Gendron, Sherbrooke, March 6.

François Giroux, trader, Montreal, Jan. 30.

Elzéar Gosselin, Sherbrooke, Feb. 18.

Ambroise Moussette, hatter and furrier, Montreal, March 6.

Ed. St. Amour & Co., boot and shoe dealers, Montreal, March 12.

Curators appointed.

Re Ephrem Bolduc, Joliette.—Kent & Turcotte, Montreal, joint curator, March 10.

Re John C. Campbell, Montreal.—Kent & Turcotte, Montreal, joint curator, March 7.

Re Hilaire Chevalier, farmer, parish of St. Elizabeth.—F. X. O. Lacasse, St. Elizabeth, curator, Mar. 10.

Re Frs. Côté, Quebec.—Wm. Doyle, Quebec, curator, March 12.

Re Esther Dannilivitch.—W. A. Caldwell, Montreal, curator, March 15.

Re Josephine Valade (Jos. Hénault & Cie.).—C. Desmarteau, Montreal, curator, March 10.

Re Joseph Gélinas.—P. Héroux, St. Sévère, curator, March 13.

Re J. H. Méthot.—W. C. Hutcheson, Montreal, curator, March 13.

Re Ambroise Moussette.—John Fulton, Montreal, curator, March 13.

Re Cyrille Quintal, butcher, Montreal.—N. P. Martin, Montreal, curator, March 8.

Re Nap. Thérout.—C. Desmarteau, Montreal, curator, March 4

Dividends.

Re F. Arpin & Co.—First and final dividend, payable April 2, C. Desmarteau, Montreal, curator.

Re Ferdinand Bégin, Lévis.—Dividend, payable April 1, Chs. J. Labrie, Lauzon, curator.

Re N. Bourgeois & Co.—First dividend, payable April 4, C. Desmarteau, Montreal, curator.

Re Joseph Donati, jeweller.—Second and final dividend, payable April 2, N. Matte, Quebec, curator.

Re John Henry Hodges.—First dividend, payable April 1, W. A. Caldwell, Montreal, curator.

Re J. B. Labelle, grocer, Montreal.—First and final dividend, payable April 3, C. Desmarteau, Montreal, curator.

Re Robert Neill, Sheffington.—First dividend, payable April 1, A. W. Stevenson, Montreal, curator.

Re J. A. Rolland & Co.—First and final dividend, payable April 3, C. Desmarteau, Montreal, curator.

Re Hormidas St. Germain.—First and final dividend, payable April 2, C. Desmarteau, Montreal, curator.

Separation as to Property.

Marie Eugénie Boucher vs. Joseph Oscar Hétu, trader, Berthier, March 10.

Emma Côté vs. Zoël Turcotte, trader, St. Thomas de Pierreville, March 1.

Marie C. Dallaire vs. Nazaire Provost, undertaker, Sorel, March 10.

Willelmène Lucas vs. François Xavier Audett carriage-maker, Sherbrooke, March 7.

Marie Louise Niverville vs. Cyrille Collin, Montreal, Feb. 24.

Salome Provencher vs. Isaac Dubord, trader, Victoriaville, March 10.

Cadastre.

Notice is given of deposit of plans of sub-divisions 1772a and 1772b, and 1475a and 1475b, Jacques Cartier ward, City of Quebec.

GENERAL NOTES.

SPARKLING WINES.—It is common knowledge that aerated waters, such as soda-water and lemonade, are manufactured by injection of carbonic acid gas; but, until Mr. Hermann Graeger was summoned to the Mansion House, we had no idea that any sparkling wine was made in the same way. Certainly the 2s. 6d. a dozen import duty, levied by the chancellor of the exchequer on champagne and other sparkling wines, has always appeared to us at least an onerous and vexatious impost; but the genius of the tradesman is great, and for contriving to evade this duty without committing any breach of law we are inclined to applaud Mr. Graeger. His method of so doing is extremely ingenious. He gets still wine imported from Eprenay, the Moselle district, the Rhine district, and Burgundy, and metamorphoses it at his place at Clapton into sparkling wine by the above simple process. In doing so he has shown himself very clever, and has committed no breach of the law. Unfortunately, for *homo sum est errare*, one part of his method has erred. He affixed to the bottles, in which he sold this sparkling champagne, hook and Burgundy, labels, which the court held indicated that the wine was imported sparkling, so that an offense was committed against the Merchandise Marks Act, for which Mr. Alderman Davies fined Mr. Graeger £20. Mr. Goldberg, solicitor, who appeared for Mr. Graeger, promised that every objectionable label should be destroyed, and that in future the labels should bear such indications as would show that the wine was made sparkling in this country. We do not doubt that Mr. Goldberg's promise will be duly observed, but we may be permitted to doubt the allegation made by him that "the wine was not only as good as the other, but better." Possibly it is to his taste. *Experito credite*. However that may be, it is the duty of our magistrates to see that the Merchandise Marks Act is most stringently enforced, and we are pleased that Mr. Alderman Davies is also of that opinion.—*London Law Journal*.

The Legal News.

VOL. XIII. MARCH 29, 1890. No. 13.

Life insurance companies do not contribute much to the incomes of the profession. It is a remarkable fact that the statements of eleven Canadian life insurance companies for 1889, show only two claims resisted, one of \$1,000 and one of \$2,000. These companies have \$126,000,000 of policies in force, and the claims paid during the year amounted to \$1,137,961. The statement for 1888 was similar. It is evident, therefore, that there is no business of the same magnitude which is so free from litigious difficulties as life insurance.

Four of the Judges of the Superior Courts in London have been absent from their courts lately owing to indisposition, and the cause is stated to be the foul atmosphere of the Court rooms. In constructing the new law courts the subject of ventilation, though obviously one of the most important to be kept in mind, has apparently been disregarded, and the result is that the Judges, who have no way of escaping the pestilential atmosphere, are continually becoming ill from its effects. Lord Justice Cotton intimated some time ago that some one would have to be committed if the air of his Court was not improved.

In Ford's handbook on oaths, of which a new edition has been issued, the author says:—"A curious incident occurred in the City of London Court during the hearing of a case in which a Parsee gentleman was called as a witness. He objected to be sworn either on the Old or New Testament, and, not being a Mohammedan, he could not be sworn on the Koran. He mentioned, however, that he had a sacred relic about his person as a charm, and he thought by making a declaration, and holding the relic in his hand, and not concealing it, the act would be binding upon his conscience. Mr. Commissioner Kerr said he would be justified in

taking the witness's declaration as proposed. He always understood, however, that a Parsee was usually sworn holding the tail of a cow, which was a sacred animal in India."

COURT OF QUEEN'S BENCH—MONTREAL.*

Partnership—Dissolution—Factory built by firm on land of one partner—Sale by licitation—Art. 1562, C. C.

Held:—Where two persons carried on the business of manufacturing cheese in partnership, and for the purposes of the business a factory was erected on the land of one of the partners, for which land a rent was paid by the firm, that on the dissolution of the partnership, and after the settlement of its affairs except as to the factory, the factory so erected belonged in common to the partners; and the partner on whose land the factory was erected was entitled under art. 1562, C. C., (if the buildings, in the opinion of experts, were not susceptible of convenient partition), to have them sold by licitation, to the highest bidder, with obligation on the purchaser to remove the same, and the price divided between partners.—*Sangster & Hood, Tessier, Cross, Church, Bossé, Doherty, JJ., May 20, 1889.*

Insolvency—Distribution of estate—Privilege—Deposit with Bank after suspension.

Held:—1. That a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt; but is obliged to deduct from his claim the amount previously received from the estates of other parties jointly and severally liable therefor.

2. A person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.—*Ontario Bank & Chaplin, Dorion, Ch. J., Tessier, Cross, Bossé, Doherty, JJ., Jan. 25, 1889.*

* To appear in Montreal Law Reports, 5 Q. R.

SUPERIOR COURT, ST. FRANCIS.

SHERBROOKE, December 20, 1889.

Coram BROOKS, J.

FLANNIGAN v. FEE et al.

Immovables by destination — Seizure in hands of purchaser in good faith — Rights of mortgagees.

Held:—That a mortgagee of an immovable on which was placed certain machinery which had become *immeuble par destination*, cannot attach said machinery by *saisie en revendication* in the nature of a *saisie-conservatoire*, in the hands of the defendant who has purchased the same in good faith.

PER CURIAM:—This was a *saisie-revendication* in the nature of a *saisie-conservatoire* to attach certain machinery, boiler, engine, bark grinder, &c., sold by defendant Fee to defendants Begin and Lemieux, alleging that plaintiff had a mortgage upon a certain tannery at South Durham for \$600 and interest. That on the 28th of May, 1889, plaintiff sold to defendant Fee his rights and pretensions to one-half of said tannery, and one undivided half of the land around the same for \$800 paid at date of sale, and also \$100 and interest due in one year from date of sale, and defendant mortgaged to plaintiff said tract of land so sold.

That there was on said tract of land, the property mentioned, which had become immovable *par destination*, *immeuble par destination*, altogether alleged to be of the value of \$689. That plaintiff has a special lien upon said machinery; that within fifteen days said machinery has been removed illegally, and that the defendants Lemieux and Begin illegally hold the same. That defendant Fee was insolvent to the knowledge of defendants Lemieux and Begin, and they combined and colluded with Fee to defraud plaintiff.

To this defendants Begin and Lemieux plead, first, a special denial; second, that they bought the articles seized about the 16th of May, that this purchase was made in good faith of defendant Fee, who delivered the articles, and they paid for them at Sherbrooke; that Fee has since left the

country, and defendants have been informed that he is insolvent.

The questions arising are two: 1. Had plaintiff a mortgage on this machinery, and if so, for how much? 2. Has plaintiff the right to pursue the defendants as they have under the circumstances *en revendication*?

As to the first question, plaintiff sold to defendant his right in one half the tannery and land, and one-half his interest in the partnership which had existed between them for \$800, \$100 paid, and for security for the balance it was declared "that the hereby sold tract of land was hypothecated under this sale;" giving it the broadest interpretation, though it is badly expressed, one-half of the property was mortgaged to plaintiff.

The articles seized in the tannery were immovables by destination, our code says, so long as they remain there. C. C. 379. Now the evidence shows that defendants by their manager, bought this machinery of defendant Fee, and paid him \$350 on the 16th May, 1889, and it was removed about the 13th of May. There is no doubt that at least one-half of the machinery was hypothecated to plaintiff. Can he follow it?

He cites *Wyatt v. Senecal et al.*, 4 Q. L. R., page 76, where it was alleged that the defendants in that case had been for a long time in possession of the Levis & Kennebec Railway hypothecated to him, plaintiff, as holder of bonds, which gave hypothec and also a privileged claim upon the movable property of the Company, and that defendants were removing a part of the movables from the railway. Here there is no allegation that defendants were ever in possession of the realty, but that defendants pleading colluded with Fee, to defraud plaintiff. If this is true, there cannot in my mind be any doubt as to validity of claim for one-half at least.

Mr. Justice Bourgeois in *Philion v. Bisson, & Graham*, Opp., 23 L.C.J. p. 32, decided that the hypothecary creditor could oppose sale of property when seized as movable, under similar circumstances. See also *Budden v. Knight*, 3 Q. L. R. p. 273; *Henderson v. Tremblay*, 21 L. C. J. p. 24, Q.B.

But the question which comes up here is,

did defendants Begin and Lemieux purchase in good faith? They bought for \$350. No greater value is established. They (through their agent) went to South Durham, and with the assistance of the other defendant, Fee, took the property out of the tannery, and it was loaded on to cars and brought to Sherbrooke for a tannery then being put into operation by them. They paid the \$350, and it is not shown to have been worth more. The defendant Fee proposed to sell, and they bought of him. It is not shown that they received any benefit or that they acted secretly or connived with Fee, nor is it satisfactorily proved that plaintiff's mortgage is not collectable out of the tannery as it now stands.

That, however, is not the question. The law is to decide. See *Marcadé & Pont*, Vol. 10, pp. 451, 452 and 453. *Aubry & Rau*, Vol. 3, pp. 427, and 428. *Grenier, Traité des Hypothèques*, page 295. See also *Longueuil v. Crevier & Crevier et al.*, 14 R. L. p. 110, and Art. 993 of the Civil Code. All these unite in saying that if a purchaser purchases in good faith, and is in possession *bona fide*, there is no revendication. The whole question turns upon this point of defendants' good faith. There is nothing in this case to justify a judgment for plaintiff, or that the parties acted in bad faith.

The judgment is as follows:—

"The Court having heard the parties, plaintiff and defendants Begin and Lemieux, upon the merits of this cause, examined the proceedings, pleadings, and evidence and deliberated;

"Considering that plaintiff hath as against said defendants pleading, failed to establish the material allegations of his declaration, and particularly that defendants pleading ever colluded with or conspired with defendant Fee to defraud plaintiff;

"Considering that so far as relates to the articles seized in this cause, to wit:—one engine and boiler and smoke stack, part of one fulling mill, one pin block, two tables, one leach, one pump, two pieces of shafting, five pullies and one bark mill, and gearing, and which had been taken from the tannery in Durham in the district of Arthabaska,

where they had been placed in the tannery occupied by defendant Fee, and became immovable by destination, that the same were sold and delivered by defendant Fee to defendants Begin and Lemieux, who required them for a tannery then being put into operation in Sherbrooke, in the district of Saint Francis, and paid for by defendants Begin and Lemieux in good faith and at a reasonable price for such articles, that defendants took possession of them having bought them for their own use, requiring them for their own tannery in Sherbrooke, that they thereby became *tiers acquéreurs* in good faith, and that even if plaintiff had a mortgage upon the undivided half of the tannery from which they were removed, of which it is shown that defendants Begin and Lemieux had no knowledge, plaintiff has no right to pursue and seize them in their hands, they having been removed from said tannery and delivered to and paid for by defendants; this Court doth in consequence dismiss plaintiff's action with costs *détruits, etc.*"

Action dismissed.

Bélanger & Genest for plaintiff.

Panneton & Mulvena for defendants.

(J. P. WELLS.)

APPEAL REGISTER—MONTREAL.

Saturday, March 15.

There being no quorum, motions were received and entered, to be heard on Monday.

Monday, March 17.

Wineberg & Hampson.—Application of respondent to have the cause declared privileged rejected.

Palliser & Lindsay.—Petition in intervention rejected.

Bryson & Menard dit Bonenfant.—Motion for leave to appeal from interlocutory judgment rejected.

Berger & Morin.—Motion for suspension of proceedings rejected.

Bernard & Bedard & Jeannotte.—Motion for leave to appeal from interlocutory judgment rejected.

Bastien & Charland; Bastien & Chagnon.—Settled out of Court.

Lallemant & Stevenson.—Motion to dismiss appeal granted.

Guy & Schiller.—Motion for leave to appeal from interlocutory judgment. C.A.V.

The Queen v. Doonan.—Reserved case heard. C.A.V.

Tuesday, March 18.

The Queen v. Lamontagne.—Petition for habeas corpus. C.A.V.

Desvoysaux Laframboise & Tarte Larivière.—Heard. C.A.V.

Bergeron & Leblanc; Bergeron & Dufrene.—Heard. C.A.V.

Lamoureux & Dupras.—Heard. C.A.V.

Larivée & Société de Construction Canadienne Française.—Part heard.

Wednesday, March 19.

Rinfret & May et al.—Motion for leave to appeal rejected.

Berger & Morin.—Acte granted of filing of copy of judgment appointing a curator.

Larivée & Société de Construction Canadienne Française.—Hearing concluded. C.A.V.

Corporation Ste. Geneviève & Boileau.—Heard. C.A.V.

Foster & Fraser.—Part heard.

Thursday, March 20.

Pratt & Charbonneau.—Confirmed. (Two appeals.)

Jetté & Dorion.—Confirmed.

Canadian Pacific Ry. Co. & Johnson.—Reversed.

Cie. de Navigation R. & O. & Desloges.—Reversed.

Cie. chemin de Jonction de Beauharnois & Leduc.—Confirmed.

Cie. chemin de Jonction de Beauharnois & Doutre.—Confirmed.

Robin dit Lapointe & Brière.—Confirmed.

Upper Canada Furniture Co. & Shaw.—Confirmed.

Guy & Schiller.—Motion for leave to appeal from interlocutory judgment dismissed without costs.

Ex parte Remi Lamontagne.—Petition for habeas corpus rejected.

Berger & Morin.—Case suspended until instance be taken up.

Foster & Fraser.—Hearing concluded. C.A.V.

Corporation de Chambly & Lamoureux et al.—Heard. C.A.V.

Friday, March 21.

Daoust & Bisson.—Motion for congé d'appel granted.

The Queen v. Slack.—Reserved case, district of Bedford. C.A.V.

Connolly & Bedard.—Heard. C.A.V.

Macmanamy & City of Sherbrooke.—Heard. C.A.V.

Merrill & Ryder.—Curator ordered to intervene to take up instance.

Roy, fils & Girard.—Part heard.

Saturday, March 22.

Schwersenski & Vineberg.—Confirmed.

Reuther & Frères des Ecoles Chretiennes.—Confirmed.

Joyal & Deslauriers.—Confirmed.

Gilmour & Elhier.—Confirmed.

Exchange Bank & Gilman.—Confirmed, without costs in either Court.

Cie. de Navigation R. & O. & Treganne.—Motion of respondent for leave to proceed in forma pauperis granted.

Ex parte P. J. Gill.—Writ of habeas corpus and writ of certiorari ordered to issue.

Roy, fils & Girard.—Hearing concluded. C.A.V.

Monday, March 24.

Reid & Macfarlane.—Motion to dismiss appeal. C.A.V.

Berger & Morin.—Motion that Seath, curator to insolvent estate of respondent, be ordered to appear. C.A.V.

Canadian Pacific R. Co. & Charbonneau.—Heard. C.A.V.

Hannan & Ross.—Part heard.

Wednesday, March 26.

Gerhardt & Davis.—Reversed.

Trustees Montreal Turnpike Roads & Rielle.—Judgment reformed; each party paying his own costs in appeal.

The Queen v. Doonan.—Conviction quashed.

The Queen v. Slack.—Conviction maintained.

Iring & Chapleau.—Motion for precedence granted.

Hannan & Ross.—Hearing concluded. C. A.V.

Ex parte P. J. Gill.—Heard on petition for *habeas corpus*. C.A.V. It was ordered that the prisoner be transferred to the custody of the sheriff of Montreal during the *délibéré*.

Hagar & Seath.—Case declared privileged.

Grogan & Dolan.—Part heard.

Thursday, March 27.

Berger & Morin.—Ordered that curator to respondent (insolvent) appear and declare whether he intends to support the judgment appealed from.

Reid & Macfarlane.—Motion of respondent for dismissal of appeal rejected.

Ex parte P. J. Gill.—Petition for *habeas corpus* rejected. Prisoner remanded to the jail for the district of Richelieu.

St. Louis & Dufresne.—Appeal declared abandoned.

Fraser & Brunet.—Reversed.

Prairie & Charbonneau.—(Two appeals) Motion for leave to appeal to P. C. rejected.

Grogan & Dolan.—Hearing concluded. C. A.V.

Iring & Chapleau.—Heard. C.A.V.

Perillier Lachapelle & Brunet et vir.—Heard. C.A.V.

The Court adjourned to Friday, May 16.

APPOINTMENT OF QUEEN'S COUNSEL.

[Continued from page 96.]

I need not multiply the authorities on such elementary principles of English constitutional law. The power of erecting tribunals and appointing judges and officers has been delegated fully, without restriction, to our central Government on certain matters, and to our Local Legislatures on others. Let me now refer to the "Colonial Laws Act of 1885," which is an Act to remove doubts as to the validity of Colonial laws:

"Section 5: Every Colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of jurisdiction, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the

administration of justice therein; and every representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such Legislature: provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or colonial law for the time being in force in the said colony."

I will apply, further on, the British North America Act to that statute so clear and conclusive. The Supreme Court of Canada seems to have overlooked, not only the precedents and authorities I quoted, but even that statute specially made and provided for the colonies; and surely nobody will deny that every Province of the Dominion is a colony. The Supreme Court has, by that decision in *Lenoir vs. Ritchie*, reversed numerous precedents and decisions of our Canadian courts, which I will not quote, the Supreme Court being a higher tribunal, sitting in appeal of the Provincial Courts. Since the decision aforesaid, of the Supreme Court, Her Majesty's Privy Council has again decided, as to the plenitude of powers conferred upon the provinces within the limits of their attributions. In the case of *Hodge vs. the Queen* (Law Reports, 9 Appeal Cases, page 132, in 1883), the Honorable Lords of the Privy Council said:—

"It appears to their Lordships, however, that the objection raised by the appellants, is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament, in the plenitude of its power, possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances, to confide to a municipal institution, or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

It seems to me that this last decision of the

Privy Council virtually reverses the judgment of the Supreme Court in *Lenoir v. Ritchie*, which, besides, never amounted to *res judicata*. In spite of that last judgment, our Canadian courts have unanimously continued to consider as valid our laws assented to by the Queen. But I will only refer to the Privy Council, and quote, by analogy, the following decisions. In 1883, in the celebrated case of Ontario Government and Mercer, it was held:—

"That lands in Canada escheated to the Crown for defect of heirs, belong to the Province in which they are situated, and not to the Dominion."—(Law Reports, 8 Appeal Cases, 1883, page 767.)

I presume it is useless to remark how much that decision has a direct bearing on the question I discuss, and how it fully recognizes the fictive presence of the Queen in the local powers. In the case of the Exchange Bank of Canada *vs.* The Queen, it was held, in 1885:

"That the Crown is bound by the two codes of Lower Canada."—(11 Appeal Cases, 1883, page 197.)

In the case of the Bank of Toronto *vs.* Lambe, and three other similar cases, it was held, in 1887:

"That the Public Act, 45 Victoria, chapter 22, which imposes certain district taxes on certain commercial corporations carrying on business in the province, is *intra vires* of the Provincial Legislatures."—(12 Appeal Cases, 1883, page 575.)

This Act had also been assented to in the name of the Queen. In the case of the Attorney-General of British Columbia *vs.* The Attorney-General of Canada, it was held, in April, 1889:

"That a conveyance by the Province of British Columbia to the Dominion, of 'public lands,' . . . does imply any transfer of its interest in revenues arising from the prerogative rights of the Crown."—(14 Appeal Cases, 1883, page 265.)

I do not pretend to exhaust the list of cases involving the same principle and affirming the same. I merely chose some of them, so as to satisfy this House as to the constant and clear opinion of Her Majesty's Privy Council. Having thus established that the Queen forms part of the Local Legislatures; that the appointment of Queen's Counsel is part of the royal prerogative equally with the appointment of all judicial officers; that the British Parliament has delegated to the

Colony of Canada all the powers and prerogatives necessary to the organising and working of the courts of justice; that all these powers and prerogatives have to be exercised in the name of the Queen, by any colony entrusted with them, there remains to be seen to what extent those powers and prerogatives were delegated to the divers Provinces of the Confederation, in so far as the courts, their officers, management and organization are concerned. That part of the question does not seem to be of a great difficulty. I freely admit that the Federal Government have the right of appointing Queen's Counsel for their own courts, for the tribunals they have a right to create in virtue of section 101 of the British North America Act, such as the Supreme Court and the Exchequer Court. But sub-section 4 of section 92 of the same Act gives exclusively to the Provinces the right over the establishment and tenure of Provincial offices and the appointment and payment of Provincial officers; sub-section 13 gives them an exclusive right over property and civil rights in the Province; sub-section 14 gives them the exclusive right over "the administration of justice, including the constitution, maintenance and organization of Provincial courts, both of civil and criminal jurisdiction," and sub-section 16 gives them the exclusive right over all matters of a merely local or private nature in the Province. The appointment of a Queen's Counsel amounts, in our days, to the giving of a rank of precedence and pre-eminence. It concerns the internal economy and management of the courts. Surely this is a local matter and civil right. It is essentially provincial. A Quebec lawyer could not plead before an Ontario court. He would have to be admitted to the Ontario bar before pleading there, and *vice versa*. Section 94 provides that the laws of Ontario, Nova Scotia and New Brunswick may be assimilated. No such disposition exists for the Province of Quebec. Our courts, bar, laws, have been, and will remain, separated, distinct, local and private, to the Province. The power of constituting, maintaining and organizing a court implies, and carries with it, all the necessary powers to regulate the internal economy of the same, the rules of practice, the

admission to the bar, the appointment of the officers of the court, the keeping of records, and everything concerning the same, save the appointment of the judges of the superior, district and county courts, reserved to the Privy Council by section 96. The first law officer of the Crown is the Attorney-General. He is appointed by the Lieutenant-Governor, and nobody ever contested the validity of the appointment. Indictments are signed in his name, and have been upheld by all the courts. He is the first of the Queen's Counsel, according to Blackstone. The Solicitor-General comes after him. Both appointments by the Lieutenant-Governor are provided for by section 63 of the Confederation Act. Would it not be most extraordinary that the Lieutenant-Governor should have the right of appointing the first Queen's Counsel, the head of the hierarchy, and should not have the power to appoint those who only rank after? Where is the clause of the British North America Act that takes away that prerogative from the Crown? When the British Crown delegated all her powers to the Provinces, in so far as the courts are concerned, she delegated the whole of her powers and prerogatives to carry that disposition of the statute into effect. It would have required a special provision to except any of those powers and prerogatives. Not only are the provincial statutes assented to invariably in the name of the Queen, but all the officers of the departments, all offices of trust, as officers of the courts, sheriffs, registrars, coroners, gaolers, justices of the peace, police magistrates, constables, legislative councillors, etc., are appointed in the name of the Queen. All the writs in the courts, viz.: of summons, *habeas corpus*, *quo warranto*, *scire facias*, prohibition, *feri facias*, *venditioni exponas*, writs of possession, all the letters patent for lands, mines, timber, for incorporating companies, all the proclamations, licenses—in a word, all the important acts of the Executive are made and issued in the name of the Crown, as required in the exercise of any royal prerogative. If the Queen did not form part of the Local Governments and Legislatures, all those appointments and documents would be void, and the Local Governments would have no power at all,

and the Confederation would be a sham. It never came into the mind of any one to deny the validity of all those Acts of the Local Governments. But why should there be an exception in regard to the Queen's Counsel? What part of the Confederation Act would justify that pretension or exclusion? If our laws were not assented to in the name of the Queen, they would have to be assented to either in the name of the Governor or Lieutenant-Governor. No part of the British North America Act gives them any such power. The Governor-General received the power of disallowance as to the bills, but never was he substituted for the Queen as the fountain of powers and honors. No disposition makes him a constituent part of a Provincial Legislature. He carries on the Government of the Dominion in the name of the Queen, and wherever he is mentioned, it means the representative of the Queen, acting in her name, using her great seal, the emblem of sovereignty. But the Local Governments have also their great seals, the affixing of which means the consent, approbation, action of the sovereign. It amounts to an official signing of a document by the Queen. A special clause of the British North America Act (sec. 136) even provides for the design of those great seals for each Province. If the Queen did not form part of the Local Legislatures, the Provinces would no more be under the monarchical system; they would be mere republics, with a president elected by the Privy Council of Ottawa. The confederate power alone would constitute a monarchy. Will any sensible man sustain such an anomaly? I have spoken of the Attorney and Solicitor General. Let me refer you to sections 134 and 135 of the Confederation Act. They give to those officers all the powers they had before the Confederation. Section 134 adds that the Lieutenant Governors "may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of these officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof." Surely the administration of justice entrusted to the Provinces is

included in those powers; and the appointment of Queen's Counsel forms an essential, though small part of the same, affecting the internal economy of the courts of justice. The Attorney General is supposed to conduct every criminal trial. Was he in court, he would be *de facto* the first Queen's Counsel. He appoints substitutes who sign and speak for him. Section 134 undoubtedly gives him the right of delegating to them part of his powers and privileges; more than all that, our Federal statutes are full of dispositions, formally recognising that the Queen forms part of the Local Legislatures. The jurors appointed by the local officers are called the jurors of Our Sovereign Lady the Queen. The indictments are drawn charging a defendant to have acted against the peace of Our Sovereign Lady the Queen, her Crown and dignity. The jurors are to be challenged or ordered to stand aside in the name of the Crown. Chapter 174 of the Revised Statutes of Canada, section 179, says:

"Provided always, that the right of reply shall be always allowed to the Attorney or Solicitor General, as to any Queen's Counsel, acting on behalf of the Crown."

Can there be a more explicit recognition of the principle I sustain? Now, how extraordinary it would be that the Attorney General would have the obligation, by statute as well as by the common law, to attend to the administration of the criminal law, would have, in virtue of the same authorities, the authority of delegating his powers, but that he could not choose whom he would please, and that he would have to wait upon the good-will of an alien Government to appoint his representatives Queen's Counsel, so as to give them the right of reply in the public interest?

[To be continued.]

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, March 22.

Judicial Abandonments.

Evariste Drouin, grocer, Quebec, March 20.
Laurent Justinien Pelletier, doing business as Jos. Pelletier & Cie., dry goods merchant, Montreal, March 18.
Anthime Robert and Julien Allard, doing business

as "Anthime Robert," traders and farmers, Upton, March 15.

Edouard St. Cyr, trader, parish of Ste. Clotilde de Horton, March 14.

Curators appointed.

Re Charles G. Davies.—J. Y. Welch, Quebec, curator, March 18.

Re W. A. Douglas, trader, Chatham.—W. J. Simpson, Lachute, curator, March 17.

Re J. B. Durocher, Montreal.—C. Desmarceau, Montreal, curator, March 8.

Re Edward P. Earle (absentee), (Earle Bros.).—T. Gauthier, Montreal, curator, March 15.

Re Jos. Gagné, trader, St. George, Beauce.—H. A. Bedard, Quebec, curator, March 18.

Re Adélard Lafontaine.—M. Crepeau, St. Félix de Valois, curator, March 17.

Re C. O. Lamontagne, Montreal.—A. L. Kent and G. de Serres, Montreal, joint curator, Feb. 20.

Re Massé & Mathieu, Montreal.—Kent & Turcotte, Montreal, joint curator, March 15.

Re E. A. Panet & Co.—D. Arcand, Quebec, curator, March 15.

Re Joseph Pelletier, Montreal.—Kent & Turcotte, Montreal, joint curator, March 20.

Re E. St. Amour et al.—C. Desmarceau, Montreal, curator, March 19.

Dividends.

Re Joseph Dagenais, Montreal.—Dividend, payable April 10, Kent & Turcotte, Montreal, joint curator.

Re John Farnan, Montreal.—First and final dividend, payable April 7, M. B. Smith, Montreal, curator.

Re C. G. Glass, Montreal.—First dividend, payable April 8, W. A. Caldwell, Montreal, curator.

Re Labonté, frère, St. Thérèse.—First and final dividend, payable March 23, Bilodeau & Renaud, Montreal, curator.

Re Joseph Leclerc, Montreal.—First and final dividend, payable April 9, W. A. Caldwell, Montreal, curator.

Re A. Paradis & Co., Quebec.—First and final dividend, payable April 3, D. Arcand, Quebec, curator.

Re Almando Parker et al.—First and final dividend, payable April 9, Millier & Griffith, Sherbrooke, joint curator.

Re Théodore Pouliot, courier, Quebec.—First and final dividend, payable April 9, N. Fortier, Quebec, curator.

Re Sinai Prevost, Montreal.—First and final dividend, payable April 10, Kent & Turcotte, Montreal, joint curator.

Re Abraham Simard, Thetford Mines.—First and final dividend, payable April 6, Aug. Quesnel, Arthabaskaville, curator.

Re St. Lawrence Warehouse Dock & Wharfage Co.—First and final dividend, payable April 9, J. Adam, South Quebec, curator.

Re Z. Turcotte, Pierreville.—Dividend, payable April 10, Kent & Turcotte, Montreal, joint curator.

Separation as to property.

Emelie Bernier vs. Louis Léon Ferland, cabinet maker, Montreal, March 14.

Olivine Charbonneau vs. Vilbon Huot, farmer, township of Granby, March 19.

Sophranie Dudevior vs. Joseph Desmarais, Montreal, March 10.

Anathalie Ranocourt vs. Jérémie Bessette, Montreal, March 1.

The Legal News.

VOL. XIII. APRIL 5, 1890. No. 14.

The gift of \$150,000, by Mr. W. C. McDonald, to the Law Faculty of McGill University, is one of the most generous contributions to legal education on record, and coming from a layman—a manufacturer and merchant—should be doubly appreciated. Wisely used, it must, in the course of the next generation, have a very appreciable influence upon the position and standing both of the bench and of the bar. In estimating the amount of the benefaction it must be borne in mind that the law faculty, differing in this respect from the other faculties, is almost exclusively for the benefit of students from the province of Quebec. The income of the gift in the next thirty years will be equal to a quarter of a million dollars, and if five hundred graduates during that time should go forth from the faculty, they would have received aid in their legal education from the endowment to the extent of five hundred dollars each. The result should be a better trained bar and a more learned bench.

The March term of the Court of Appeal at Montreal did not do much to break down the list. By a misunderstanding, the first day was wholly lost, and another term day was a holiday, so that the Court sat on nine days only. Then there were two reserved cases, and two applications for *habeas corpus*, with the usual number of applications for leave to appeal, all of which consumed much time. Three privileged cases further interfered with the progress of the list, and the country cases got two days to which, as it turned out, they were not entitled, as No. 11 was the last case reached on the regular list, while the first country case was No. 17. Of course, in allotting special days to country cases it was not intended to give them precedence, by a whole term, over city cases previously inscribed. The result of the chapter of misadventures was a curious one. A case which had come in sight during the

January term so as to be put on the list for the day, was not reached or called during the whole of the March term, though always on the list for the day! The total number of appeals heard during the term was sixteen.

The districts of Montreal and Quebec, by a singular coincidence, lost their sheriffs on the same day (April 4), a deputy sheriff of Montreal (Mr. Vilbon) having also died a few days before his chief. The sheriffs both entered public life at an early age. Mr. Chauveau, the sheriff of Montreal, was called to the bar in 1841, and in 1844, at the age of 24, was elected to Parliament for the county of Quebec. If not brilliant in any special vocation, he evinced considerable versatility, and a faculty for adapting himself to whatever office was open to him. As Superintendent of Education, as Premier of Quebec, as Speaker of the Senate, and finally as Sheriff of Montreal, most of his days were passed in harness. These official occupations, however, did not prevent him from devoting considerable time to literature, in which line he achieved some distinction. Mr. Allyn, the Sheriff of Quebec, who had nearly completed his 73rd year, was born in Cork, Ireland. He came to Canada while still very young. In 1854 he became Mayor of Quebec, and entered Parliament the same year. In 1866 he was appointed Sheriff of Quebec.

The retirement of Mr. Justice Field, which took place recently in the presence of all the judges of England (except two absent from illness and several on circuit), is only the eighth instance during the last half century of a common law judge retiring while the Courts were sitting, and receiving a valedictory address. Mr. Justice Field, like Mr. Justice Manisty, began in the other branch of the profession, but after three years' experience as a solicitor he made a "jettison" of everything for the bar. "When I accepted that sacred trust of the office of a judge," he went on to say, "I formed to myself my ideas of what I would do to try to deserve it; that I would administer what was right and in accordance with the truth, and would spare no labour, no pains, no time, to understand what the rights and wrongs

of the litigants were, and would never swerve from the path to the right or the left in deciding what, to my mind, was the real result. And that I have done, and I do claim at the end of my time that there is no one who can accuse me—and, what is more important, I cannot accuse myself—of any delinquency in that respect. Whatever God had been pleased to give me, the best I had I have given to the discharge of my duties." The learned judge further alluded to a delicate subject—his deafness—as to which judges usually are apt to be sceptical. "Of late years, indeed, I have been conscious of a growing infirmity, but I declare most solemnly that it has never interfered with the discharge of my duties, though it may have been a cause of inconvenience to those who have addressed me or to witnesses who had to give their evidence before me. That inconvenience has been very much aggravated by my determination never to pass over a fact in the case without really understanding it; and I do not believe that a word of evidence has ever been given which would not be found on my notes, and I am sure that no argument addressed to me has failed to receive the fullest consideration. At the same time I am sensible that those who come to the Courts for justice and those who represent them have not only a right to have justice administered to them with care and patience, but also with the assurance that their cases are heard as well as determined and I cannot blame anybody who may have fancied that a difficulty resulted from my infirmity, though I am sure that my infirmity never caused any injustice to a suitor." As the learned judge rose to depart, the report states that the bar, and the audience generally, "broke into a burst of cheers as warm as ever was heard."

SUPERIOR COURT—MONTREAL.*

Costs—Commission rogatoire—Fees of Commissioner.

Held:—That where a *commission rogatoire* issues to a foreign country, a reasonable fee to the Commissioner appointed to execute

the commission will be taxed as costs in the cause.—*Blandy et al. v. Parker, Pagnuelo, J.*, Oct. 30, 1889.

Accident Insurance—External injuries producing erysipelas—Proximate or sole cause of death—Immediate notice of death—Waiver.

An accident policy issued by the defendants was payable "within thirty days after sufficient proof that the insured, at any time during the continuance of this policy, shall have sustained bodily injuries effected through external, accidental and violent means, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof.
"Provided always that this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract, or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The insured was accidentally wounded in the leg by falling from a verandah, and within four or five days, the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued twenty-three days after the accident. There was some conflict in the evidence as to whether the erysipelas resulted solely from the wound, but the Court found, on the facts, that the erysipelas followed as a direct result from the external injury;

Held:—1. That the external injury was the proximate or sole cause of death within the meaning of the policy, and that the plaintiff was entitled to recover.

The policy also provided that "in the event of any accident or injury for which claim may be made under this policy, immediate notice must be given in writing, addressed to the manager of this company,

* To appear in Montreal Law Reports, 6 S.C.

"at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under this policy."

The local agent of the company at Simcoe, Ont., after receiving written notice of the accident before death, was verbally informed of the death four days after it took place, and thereupon stated that he would require no further notice and that he had advised the company. Further interviews and correspondence took place during the following days between the local agent and the claimants with respect to the papers required, but formal notice was not sent to the head office until sixteen days after death. The manager of the company acknowledged receipt of proofs of death, without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and that therefore the company could not recognize their liability.

Held:—2. That the company had received sufficient notice of death to satisfy the requirements of the policy, and that, in any event, they had expressly waived any objections which they might have urged in this regard, by declining to pay the claim on other grounds.—*Young v. Accident Insurance Co. of N.A.*, Tellier, J., Sept. 13, 1889.

Cheque payable to bearer—Endorsement "for deposit"—Negociability—Payment by one bank of cheque drawn on another bank—Good faith.

The liquidators of the Exchange Bank handed to V., their accountant and confidential clerk, a cheque drawn by one of their debtors on The People's Bank payable to "Archibald Campbell, Frederick B. Matthews and Isaac H. Stearns, liquidators, or bearer," and endorsed by the three liquidators "For deposit to credit of the liquidators Exchange Bank of Canada." The Quebec Bank at that time received deposits from the liquidators in a regular deposit account, and also assisted them in the redemption of the circulation of the insolvent bank by purchas-

ing the bills of the latter, which were afterwards redeemed by the liquidators.

V., instead of making the deposit as instructed, presented the cheque to the paying teller of the Quebec Bank, who had shortly before requested V. to redeem some of their circulation, and received the amount in Exchange Bank bills, which he appropriated to his own use. The teller of the Quebec Bank did not notice the restrictive endorsement and paid the cheque in good faith to V.

Held:—1. That a cheque payable to a certain person or bearer is equivalent to a cheque payable simply to bearer.

2. That the negociability of such a cheque cannot be restricted by endorsement, and the bearer thereof has a sufficient title to demand and receive payment thereof.

3. That even if the payment by one bank of a cheque drawn on another bank may at first sight seem irregular, still, under the circumstances of this case, as the cheque had been paid in good faith, in ignorance of the endorsement, to the trusted employee of the liquidators of the plaintiff bank, and for the purpose of redeeming its circulation, the payment made to V. discharged the defendant bank.—*Exchange Bank v. Quebec Bank*, Jetté, J., Feb. 12, 1890.

COUR DE MAGISTRAT.

MONTREAL, 21 juin 1889.

Coram CHAMPAGNE, J. C. M.

VOGEL v. PELLETER.

Bail—Minorité—Résiliation—Loyers non échus.

JUGE:—1o. *Qu'un mineur qui loue une boutique pour y pratiquer son métier de barbier, est réputé majeur, et peut être poursuivi en recouvrement du loyer en vertu de ce bail.*

2. *Qu'un locateur ne peut demander en même temps la résiliation du bail et les loyers à venir.* (1)

PRES CURIAM:—Le demandeur a loué au défendeur une boutique de barbier au prix

(1) La jurisprudence sous l'article du Code Civil accorde les loyers à venir, même en cas de résiliation de bail, mais sous forme de dommages dont il faut faire la preuve. La mesure des dommages, dans ce cas, est le montant du loyer stipulé au bail résilié. Dans l'espèce, l'on demandait, non des dommages prouvés, mais du loyer sans autre preuve que le bail.

de \$8.50 par mois, et après l'avoir occupée pendant quelques jours, le défendeur l'a quittée sans la permission du demandeur.

Le demandeur poursuit pour le montant du loyer pour toute la durée du bail, 6 mois, et demande en outre, la résiliation du bail.

Le défendeur plaide qu'il est mineur, qu'il n'avait pas le droit de louer et qu'il ne peut pas être poursuivi, et qu'il a été lésé par le demandeur.

La preuve établit que le défendeur est âgé de 18 ans, qu'il est barbier, et qu'il tient une boutique à son compte, ayant plusieurs hommes à son service.

Le défendeur est réputé majeur pour les fins de l'exercice de son métier, et comme tel, il avait le droit de louer le logement en question. Mais, le demandeur ne peut en même temps demander jugement pour les trois mois de loyer à venir et demander, en outre, que le bail soit cassé de suite.

Jugement résiliant le bail et accordant deux mois de loyer dûs.

Autorités: C. C. 319, 1005; *de Lorimier*, vol. 17, art. 1005; *Demolombe*, vol. 29, art. 1308, C. N. p. 97.

Papineau & Gratton, avocats du demandeur.

La. Allard, avocat du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 5 juin 1889.

Coram CHAMPAGNE, J. C. M.

THÉORET V. SÉNÉGAL.

Exception à la forme—Amendement.

JUGE:—*Que celui qui se plaint de la forme chez son adversaire doit être sans faute sous ce rapport, et qu'un amendement à une exception à la forme nulle au moment de sa production ne peut être accordé.*

PER CURIAM:—Dans cette cause, le défendeur a plaidé par une exception à la forme, se plaignant que le demandeur ait pris cette action, qui est une action pénale sous le Code Municipal, sans mettre en cause la Corporation à qui doit appartenir la moitié de l'amende, mais dans son exception à la forme, le défendeur a omis de prendre des conclusions. Il demande maintenant d'y ajouter

pour conclusions: "que l'action du demandeur soit déboutée avec dépens distracts..."

L'exception à la forme doit être produite dans ces causes dans les deux jours de la comparution, et elle doit être complète et à l'abri d'un défaut de forme; permettre un amendement ce serait violer cet article.

Amendement refusé.

Autorités: 10 R. L. 678; *Rev. de Législation*, 3 vol. 40; 15 L. C. J. 246.

Prévost & Bastien, avocats du demandeur.

Lacoste et Cie., avocats du défendeur.

(J. J. B.)

APPOINTMENT OF QUEEN'S COUNSEL.

[Continued from page 104.]

There remain the questions of convenience or expediency and of sanction by enforcement of the appointments. It will be clear in the eyes of every one that the local powers are in a better position than the central power to judge the requirements of the Province, the qualifications of the lawyers. It would not be fair that the majority of the vast Dominion should oppose its will, in that respect, to the majority of a Province. As to the sanction of the appointment, if there was a conflict between the Federal and Local Governments, how could the federal authority have its appointments recognised? Suppose the judge appointed by Ottawa should desire to recognise and enforce them in spite of the local authority, he would be surrounded by sheriffs, prothonotaries, clerks, bailiffs, gaolers, all appointed by the Province, receiving instructions from the same, being paid by the same. He might have to leave the bench, act as sheriff, take a man by the throat, conduct him to gaol where the gaoler would tell him: "I have instructions not to receive that prisoner!" He might have to sign and execute himself, his own warrant of distress. That suffices to exemplify the impossibility of this Government having any such appointment by them recognised and sanctioned by due execution. Though the possibility of execution has always been looked upon as a criterion of jurisdiction. In the case of *Lenoir vs. Ritchie*, Hon. Judge Fournier said:

"It is a general principle that a court has no jurisdiction in cases wherein the judgment it would give would not be susceptible of execution."

Broom: "Commentaries on the Common Law," page 54: "The word 'law,' indeed, *ex re termini*, implies a sanction." I think I have demonstrated:—1st. That the Queen forms part of the Local Governments, as well as of the Federal Government. 2nd. That every one of them are supreme within the limits of their attributions, deriving their authority directly from the Queen. 3rd. That the administration of justice entrusted to the Local Governments carries with it all the prerogatives of the Queen, necessary to the good working and management of the courts, and that the appointment of Queen's Counsel forms an ingredient and inseparable part of the same. 4th. That the decision to the contrary by the Supreme Court of Canada, in the case of *Lenoir vs. Ritchie*, is an isolated one, rendered on a point not in issue nor argued contradictorily, without the interested parties being called to answer, by a divided and incomplete bench, is contradictory to all precedents as well to the precise terms and true interest and meaning of all the laws in force; that the principles upon which it rests have frequently since been denied and reversed by the highest tribunals of the Empire, and that the adoption of those principles would render impossible the working of the Confederation as well as the administration of justice. Since these notes have been prepared, I, fortunately, have procured a copy of a most able memorandum sent to this Government by the Ontario Government. As we have the assurance that it will be laid officially before the House, that will meet the object I have in view. By an official letter, dated 27th September, 1886, the Government have refused to comply with the desire expressed by the Ontario Government of having the question of Queen's Counsel and the jurisdiction as to their appointment submitted to the Privy Council upon a joint case. And they say:

"His Excellency is advised that so long as the judgment in *Lenoir vs. Ritchie* is not revised, it is the duty of Governments and individuals in Canada to respect and conform to that judgment."

Such is the policy adopted by the Government on that question. They take advantage

of an *ex parte* judgment denying the Provinces an important right, namely, the right of using the great seal in the name of the Queen, and refuse the Provinces the opportunity of being heard before the competent tribunals. In spite of that, the commissions of Queen's Counsel, issued by this Government, prove that some doubts still exist in the mind of the hon. Minister of Justice. After having stated after whom the new Queen's Counsel will rank, to wit, after Queen's Counsel created by the Provinces before Confederation, and after Queen's Counsel created by Ottawa since the Confederation, these commissions add: After "those members of such bar (if any) who may lawfully be entitled to rank and precedence over you the said * * *." Who are those? The document professes not to know it! Let the title bearer find it out for himself! The Department is impotent in that regard. I am surprised that a Government allows such ludicrous documents to officially issue from the Department of Justice, by the head of whom the laws are presumed to be entirely known, understood, and put into practice. The same letter affirms that no inconvenience has been occasioned by the judgment. I think I have proved that the very reverse of that pretension is actually the case. It is greatly time that this question be finally and clearly settled. Therefore, I beg to submit the following proposition to this honorable House, without making of the same a question of non-confidence:

"That, in the opinion of this House, it is the exclusive right of the Local Legislature and the Executive of each Province to appoint Queen's Counsel for all courts established, maintained and managed by such Province, and to settle the rules and rights of precedence or pre-audience of the bar in proceedings in such courts."

Sir JOHN THOMPSON.—The subject which the hon. member for Bellechasse (Mr. Amyot) has brought to the notice of the House this afternoon, of course the House will regard as one of very great importance, not only for the rights which are immediately bound up in connection with the appointment of Queen's Counsel for the various Courts in this country, but because, as he has indicated very clearly, the subject branches out

into constitutional questions lying at the basis of much larger rights than those of Her Majesty's Queen's Counsel in the courts. I cannot too strongly express my appreciation of one observation which the hon. gentleman made towards the close of his address, when it was suggested that he should proceed with the reading of a document which came to this Government from the Government of Ontario. The hon. gentleman hesitated to do so, on the ground that the reading of documents of that character, touching upon legal and constitutional questions, gave the House very little information and instruction, and required, in order to be appreciated, to be more carefully read than can be done in the progress of the debate. I feel I must, with great respect to the hon. gentleman, apply that observation to the whole of the argument on this question he has submitted. I feel somewhat at a disadvantage in coming to the discussion of an abstruse constitutional question, involving questions of great importance, without the slightest notice whatever, considering it touches a subject not only of constitutional importance, but also involving legal technicalities which I have not looked at for a good many months, and therefore, the hon. gentleman will not consider me, I am sure, wanting in courtesy to him, if I find myself, this afternoon, unable to contribute anything to the discussion of this question which will very much interest the House or throw very great additional light on the subject. I, however, have had some acquaintance with it. I am in a position to assure the hon. gentleman that one of the propositions which he states at the conclusion of his paper, as having been completely established, namely, that the decision in the case of *Lenoir v. Ritchie* was upon a point not before the Court, not raised on the appeal, not considered in the judgment below, that point, so far from being established, would not be considered well founded by anyone who was acquainted, as I have had to be, with the case of *Lenoir v. Ritchie* from its inception to its close. So far from it being correct, as the hon. gentleman supposes it to be, from the statement by Mr. Haliburton, in the course of his argument before the Supreme Court on appeal, that the constitutional ques-

tion had not been raised in the Court below, I am in a position, as the counsel who argued the case, to say that that was the gist of the whole argument in the Court below; and not only so, but if the hon. gentleman will turn to the decision in the Court below, the Supreme Court of Nova Scotia, he will find the judgment of one of the judges giving judgment on behalf of Mr. Ritchie proceeded only on the constitutional ground and disregarded all others; and that constitutional ground was more or less discussed likewise in the positions taken by the other judges.

Mr. AMYOT. I took my information from the reports of the Supreme Court.

Sir JOHN THOMPSON. I would refer the hon. gentleman, for further information, to the decision in the Court below, not only given in the Supreme Court reports, but as embodied in the Cartwright edition of constitutional cases, and it immediately follows the decision in the Supreme Court of Canada. The hon. gentleman intimated to the House that the decision in the case of *Lenoir v. Ritchie* was an erroneous one, and he arrived at that conclusion by a course of reasoning, in which he sought to affirm the proposition that Her Majesty is constitutionally a portion of the Provincial Legislatures, and he came to the conclusion that that proposition had been denied by the Supreme Court of Canada in the judgment of *Lenoir v. Ritchie*. I venture to say that the judgment in the case does not proceed on that ground, and I venture to differ from the hon. gentleman that he has established that the Crown is an integral part of the Legislatures of the provinces. Let me first refer to the course of reasoning by which the hon. gentleman sought to establish that position. He sought to establish it by showing a course of legislation existing long prior to the confederation of the provinces, to the Imperial legislation confirming certain rights and powers to the use of Her Majesty's name in the functionaries who, from time to time, governed the different provinces in British North America. The hon. gentleman referred to the practice which prevailed in some of the provinces, of using Her Majesty's name in the enacting part of the provincial statutes. Let me submit for the hon. gentleman's con-

sideration, in the first place, that Imperial legislation prior to Confederation has really no bearing upon the subject, and that the provision in the Colonial Statutes Act of 1865, passed in the Imperial Parliament, and designating the powers which Colonial Legislatures possessing representative institutions can wield, has really no bearing on the subject, for this very obvious reason, that, in 1867, by the British North America Act, there was a completely new distribution of the powers by the Imperial Parliament. In reference to all the provinces of Canada, I think I am speaking within the lines of the decisions, which have all run one way, proceeding from the Judicial Committee of the Privy Council, all the legislative powers and constitutional functions which existed down to that time in the various provinces in British North America were, for the instant, taken back by the Imperial Government and redistributed under the terms of the British North America Act. Whether I am strictly correct in stating that they were taken back or not, certain it is that from that time forward the distribution of powers in those various provinces must depend upon the provisions of that Act, and on that Act alone. Nowhere is it provided in that Act that Her Majesty shall be considered an integral part of the Provincial Legislatures. So much for the early Imperial legislation on the subject. I will come by-and-by to refer to the hon. gentleman's argument, that Her Majesty's prerogatives are necessarily involved in the administration of public affairs in each province. That I do not dispute. I am confining my argument for the present to the contention that Her Majesty is not an integral part of the Legislatures of the provinces, as was held, and properly held, in the case of *Lenoir v. Ritchie*. As to the practice which the hon. gentleman has cited, of Provincial Legislatures using her Majesty's name in the enacting part of the statutes of the provinces at various times, I beg likewise to differ from him, both as to the conclusions which he would draw from that circumstance, and as to the extension of the practice itself. In the province of Canada, the practice did exist before Confederation, of enacting these statutes in the name of the Queen, and that

practice, without authority, I think, without anything more to be said for it than a mere desire to continue the form which prevailed before Confederation, was carried forward and continued, and to this day, not only in Ontario, but in the province of Quebec, the statutes continue to be enacted in the name of the Queen. Now, it does not by any means follow that Her Majesty is the enacting power, and as to the correctness of that practice, I do not feel myself sufficiently informed to criticise the soundness of it, as applied to the province of Canada before Confederation. It may have been proper to use it there, on account of the circumstance that in that province Her Majesty's rule was administered by her direct representative, the Governor General. But I can assure the hon. gentleman that that practice did not exist in the other province of Canada, and that from the time representative institutions were given, down to the present moment—outside, I mean, of the old limits of Canada—the statutes were, from the earliest periods, and are to-day, enacted in the name of the Governor in Council and of the Assembly, without any pretence whatever that Her Majesty is part of the legislative body. I conceive, Sir—and in this respect I again differ from what the hon. gentleman has said—that that is of no material consequence whatever; and I am unable to agree with the hon. gentleman, that if Her Majesty is not a part of the Legislature of the province, it follows that the statutes purporting to be passed in Her Majesty's name are invalid, or inoperative, or should have been disallowed. On the contrary, the vitality of a statute arises from the fact of its having been enacted, by the powers which have a right to pass it, within the British North America Act. If a statute is passed by the Lieutenant Governor of a province, with the advice of his Assembly, and his Legislative Council if he have one, that statute is valid, as the statute of the province, and as I submit, valid, altogether irrespective of any style by which it purports to have proceeded from her Majesty. If the Act was actually passed by the Legislature of the province, it is immaterial that it purports to have been enacted likewise in the name of Her Majesty.

(To be continued).

INSOLVENT NOTICES, ETC.

*Quebec Official Gazette, March 29.**Judicial Abandonments.*

Marie Anne Dussault, carrying on business under the name of Gingras & Co., joiners' work, Montreal, March 21.

Patrick Doyle, baker, Montreal, March 13.

Isaac Dubord, trader, Victoriaville, March 23.

Jacques Neveu, Sr., trader, Ripon, March 21.

John S. Murphy & Co., Quebec, March 22.

John S. Murphy, Quebec, March 22.

William H. Wilson, Quebec, March 22.

Curators appointed.

Re Ed. N. Blais & Co., merchants, Quebec.—H. A. Bedard, Quebec, curator, March 23.

Re Narcisse Edouard Cormier, lumberman, Aylmer, —Wm. Grier, Montreal, curator, March 22.

Re Patrick Doyle, baker, Montreal.—W. F. Johnston, Montreal, curator, March 21.

Re Lamareche, Prévost & Cie., Montreal.—Kent & Turcotte, Montreal, joint curator, March 27.

Re Narcisse Edouard Morrisette, trader, Three Rivers.—H. A. Bedard, Quebec, curator, March 24.

Re E. E. Parent, painter, Hull.—Wm. Grier, Montreal, curator, February 23.

Re Laurent Justinien Pelletier, Montreal.—W. A. Caldwell, Montreal, curator, March 23.

Re J. F. Plourde, St. Etienne.—F. Valentine, Three Rivers, curator, March 20.

Dividends.

Re George Bergeron, Montreal.—First and final dividend, payable April 15, W. A. Caldwell, Montreal, curator.

Re James Bisset et al.—Third and last dividend, payable April 10, James Reid, Quebec, curator.

Re E. Massicotte & frère.—First and final dividend, payable April 16, C. Desmarteau, Montreal, curator.

Re Ambrose Ruflange, contractor.—Dividend, payable April 15, R. S. Joron, Salaberry de Valleyfield, curator.

GENERAL NOTES.

EPITAPH ON LORD WESTBURY.—'A Barrister' of Lincoln's Inn writes to us to correct a mistake in the lately published 'Life of Lord Westbury' as to the famous epitaph suggested for Lord Westbury after his judgment in the *Essays and Reviews* case. The *jeu d'esprit* is there attributed to the late Sir Philip Rose. As a matter of fact, the author of the epitaph was Mr. E. H. Pember, Q.C., the well-known leader of the Parliamentary bar. A more brilliant *mot* was perhaps never published. Within twenty-four hours after its appearance in the *Spectator* everyone at the clubs was saying, 'Have you seen Pember's latest?' The passage runs thus: 'Towards the close of his earthly career, in the Judicial Committee of the Privy Council, he dismissed hell with costs, and took away from orthodox members of the Church of England their last hope of everlasting damnation.'—*Law Journal*.

NO CHICKS.—Mr. Justice Field, of the Supreme Court of the United States, is reported to have said to a Chicago interviewer: "We are no chicks. My oldest brother, David Dudley, is eighty-four years old; I am seventy-three; Cyrus is seventy and Henry sixty-seven."

AN ESCAPE.—A curious lawsuit has been decided in Wisconsin. An inmate of one of the county poor houses escaped last winter, and in wandering through the woods was terribly injured by frost, eventually losing both feet. He brought suit against the keeper of the poor house for allowing him to escape, and has recovered a verdict of \$2,300. He was defeated at first, but the Supreme Court sustained his right to sue, and he wins on the second trial.

LAWYERS' WILLS.—The old proverb which, in terms at least, is not complimentary to the man who undertakes to be his own lawyer, is again illustrated in the matter of the Tilden will, the fate of which adds further testimony to the popular belief that a great lawyer is often not capable of making his own will. According to a decision just rendered by the general term of the New York Supreme Court, the late Samuel J. Tilden, who, in his time, was regarded as a lawyer of eminence, has failed to make a valid disposition of his property to the 'Tilden Trust,' an institution which he intended to have incorporated for the establishment of a free library and reading room in the city of New York. In his will Mr. Tilden requested his executors to obtain from the legislature the incorporation of the 'Trust,' and authorised them to convey the entire available residue of his estate, after the deduction of certain bequests, or such portion thereof as they should deem expedient, to the trust. The court holds that the devise is void for indefiniteness, and that the discretionary power vested in trustees is incompatible with the existence of a trust. If this decision should be sustained by the court of appeals, a noble provision for the establishment of a public library, amounting to about \$4,500,000, will be lost to New York city. Up to the present, it should be noted, the supreme court judges, before whom the will has come, have been equally divided upon the question of its validity. The judge before whom the will first came held the trust valid, and one of the three general term judges, a judge of much ability and learning, too, dissents from the decision overruling the earlier judgment.

A SINGLE EYE TO JUSTICE.—Who that saw can ever forget Judge Baloom's wide-eyed amazement when he beheld, entering one after another, the unique collection of monocular officers who composed his famous one-eyed court? "A constable, an associate justice, the clerk, and the orier, beamed affably upon His Honor from out of their solitary optics; and then in walked Henry Van Duser, Schuler county's able, one-eyed District-Attorney. Dazed for a moment, the astonished Justice closed first one eye and then the other to convince himself that his vision was still duplicate, and then, arising, opened the term with the remark that "this court will now enter upon its labors with a single eye to the furtherance of the business before it."—*Rochester Herald*.

The Legal News.

VOL. XIII. APRIL 12, 1890. No. 15.

The London *Law Journal* referring to a recent judicial appointment which has been criticized, says:—"Experience teaches that no prophecies are more often falsified than those which pretend to forecast the success or failure of a judicial career. It would be easy to point to cases in which selections condemned at the time have been by the event proved to be wise. It would be equally easy to point to more than one case in which the judge, to use the words of Tacitus, was 'consensu omnium capax imperii nisi imperasset.' The fact is, that so many qualities go to make a good judge, it is not enough for a man to be a learned lawyer or a powerful advocate. He may be either or both of these without having the virtues of good temper, patience, discretion, fairness of mind, knowledge of the world, and industry—all of which are most desirable in a judge."

By Section 89 of the Banking Bill now before the House, the Government propose to lay their hands upon monies the precise amount of which it is impossible to estimate. The Banks make a return of unclaimed dividends, but besides these sums, there are deposits made in banks by persons who for some reason or other do not claim them, and of which nothing is ever heard. The section reads as follows:—

"The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver General, to be by him laid before Parliament, a statement of all dividends which have remained unpaid for more than five years, and also of all amounts or balances due by the bank to any person or persons, firm or corporation, whether in his or their own name or names, or in a representative capacity, in respect to which no transactions have taken place or upon which no interest has been paid during the five years prior to the date of such statement: Provided always,

that in case of moneys deposited for a fixed period, the period of five years above referred to shall be reckoned from the date of the termination of such fixed period:

"2. Such statement shall set forth the name of each creditor, his last known address, the amount due, the agency of the bank at which the last transaction took place, and the date thereof:

"3. Each bank which neglects to transmit or deliver to the Minister of Finance and Receiver General the statement above referred to, within the time hereinbefore limited, shall incur a penalty of fifty dollars for each and every day during which such neglect continues:

"4. All moneys, together with any interest due thereon, remaining unclaimed for three years after the first return thereof made in manner above provided, shall be paid by the bank to the Minister of Finance and Receiver General, on behalf of Her Majesty, for the public uses of Canada; but in case a claim to any moneys so paid as aforesaid should be thereafter established to the satisfaction of the Treasury Board, the Governor in Council shall, on the report of the Treasury Board, direct payment thereof to be made to the parties entitled thereto, together with interest on the principal sum thereof at the rate of three per centum per annum for a period not exceeding six years from the date of payment thereof to the said Minister of Finance and Receiver General as aforesaid: Provided however, that no such interest shall be paid or payable on such principal sum, unless interest thereon was payable by the bank paying the same to the said Minister of Finance and Receiver General."

It is curious that these unclaimed deposits should have been so long overlooked. Attention was recently directed to the same subject in England. There the Supreme Court, it is stated, has charge of £74,000,000 belonging to 40,000 suitors; but the amount in banks at the credit of persons who have disappeared is not known. The banks apparently have no special claim to appropriate these sums. Efforts should be made to find the owners; and if there are no heirs or claimants the state should receive the benefit.

COUR DE CIRCUIT.

MONTREAL, 20 mars 1890.

Coram OUMET, J.

POITEVIN v. LÉDOUX, & SAGER, T. S.

Saisie-arrest après jugement—Déclaration—Défaut de déclarer de novo, de plano après un mois—Ordonnance—Contestation de l'ordonnance—Salaire payé d'avance—Contestation des déclarations.

JUGÉ :—Qu'en vertu du Statut de 1888, les ouvriers et journaliers ne peuvent être payés d'avance dans le but de les protéger contre la saisie de leurs salaires ; qu'un patron—que son employé soit payé d'avance ou non—est tenu, dans tous les cas, sous peine de s'obliger personnellement, de se conformer en tout point au statut de 1888, quant à ce qui concerne les déclarations et le dépôt en Cour.

Le 18 octobre 1889, le demandeur fit signifier une saisie-arrest après jugement au défendeur et au tiers-saisi ; le 26 du même mois le défendeur fit défaut et le tiers-saisi comparut et déclara comme suit : "*That at the time of the service made upon me of the writ of saisie-arrest issued in this cause, I had not, have not now and it is not to my knowledge that I will have hereafter in my hands, possession or custody any sum of money, credits, moveables or effects belonging to the defendant in this cause. The defendant is still at my employ, with a salary of twelve dollars a week. Since the service, I paid him no money.*"

Le 9 décembre 1889, le demandeur fit une motion par laquelle il demanda que, vu qu'il apparaissait, par la déclaration du tiers-saisi en date du 26 octobre 1889, que le défendeur était encore à son emploi, et que le tiers-saisi avait négligé de renouveler sa déclaration après l'expiration d'un mois, il fût enjoint au dit tiers-saisi de déclarer *de novo*. Cette motion *of course* fut accordée avec dépens, *nisi causa*, etc.

L'ordonnance au tiers-saisi de comparaître *de novo* fixait le 12 décembre 1889, et, au jour indiqué, le tiers-saisi se présenta au greffe de la Cour de Circuit et fit *de novo* sa déclaration sous les réserves suivantes : "*And said James Sager, in obedience to an order of this Court,*

bearing date the 9th December instant, appears under reserve of his right to contest the Rule or Ordonnance served upon him, and says : " That at the time of the service made upon him of the writ of saisie-arrest issued in this cause, namely the 19th October, 1889, he owed nothing to said defendant."

Cross-examined by plaintiff.

" *I have paid defendant \$84.00 since the service of the present attachment. The defendant is still at my employ. During the past twelve months, the defendant has been paid in advance. It was after the defendant entered my employ that I ascertained the defendant was in debt when several seizures were served upon me : there was another seizure of attachment prior to the present one and another after, from other parties. The defendant is employed by the week.*"

Immédiatement après sa déclaration, le tiers-saisi contesta l'ordonnance en ces termes : "*That the proceedings herein taken are illegal, null and void ; that at the time of the attachment made in his hands, he owed nothing to defendant ; that defendant is his foreman, and will not remain with the tiers-saisi unless the latter pay him always one week's salary in advance ; that defendant is engaged by the week and earns \$12, with which he has to support his wife, children and himself ; that the law prohibiting the attachment of working men's wages in advance has never been repealed, and such an enactment would simply prevent the defendant from earning his livelihood ; that the tiers-saisi is not bound to make a monthly declaration, nor is the tiers-saisi liable in any way to plaintiff. Wherefore the tiers-saisi prays the dismissal of the said rule with costs, etc.*"

De son côté, le demandeur contesta les deux déclarations du tiers-saisi et alléguait ce qui suit : "*Qu'il est faux que le tiers-saisi ne soit pas endetté envers le demandeur ; que vu la déclaration du tiers-saisi en date du 26 octobre 1889, il appert que le défendeur était encore à son emploi et que, depuis cette dernière date jusqu'au 12 décembre 1889, il lui aurait payé la somme de \$84, malgré que par la loi la saisie-arrest fût de plein droit tenante ; que le tiers-saisi et le défendeur ne peuvent s'entendre pour éluder la loi en fraude*

des droits du demandeur ; que le demandeur par la loi avait droit au quart du salaire du défendeur et que le tiers-saisi devait déposer en Cour cette quotité tous les mois en faisant sa déclaration ; que le tiers-saisi, sans s'occuper de la loi a négligé de déclarer *de novo* après l'expiration du mois écoulé depuis sa première déclaration, et de déposer en Cour le quart des gages du défendeur ; que ce n'est que sur l'ordonnance de cette Cour qu'il vint faire une nouvelle déclaration dans laquelle il dit avoir payé au défendeur depuis la signification de la saisie-arrêt une somme de \$84.

" Pourquoi le demandeur conclut à ce que cette Honorable Cour, faisant droit sur la présente contestation, déclare la dite contestation bien fondée; déclare de plus que par la signification du bref de saisie-arrêt en cette cause le quart des gages du défendeur était saisi pour tout le temps que ce dernier travaillerait à l'emploi du tiers-saisi, tant que le jugement du demandeur n'aurait pas été éteint, et que de plus, le tiers-saisi n'avait pas le droit de payer au défendeur ainsi qu'il l'a fait; à ce qu'en conséquence le dit tiers-saisi soit condamné à payer au demandeur le quart de la somme de \$84.00, sans préjudice au droit d'avoir la présente saisie-arrêt tenante, avec dépens, etc."

Après la contestation liée, les parties inscrivirent sur les deux contestations à la fois, et, sans preuve de part et d'autre, admirent comme vraies toutes les pièces du dossier.

A l'argument, Me Edmund Guerin prétendit que le statut de 1888, n'avait pas eu pour effet d'abroger ni d'amender le paragraphe 5 de l'article 558 du C. P. C., qui déclare insaisissables les gages et salaires non échus, et qu'en outre le défendeur étant engagé à la semaine et payé d'avance comme condition de son travail chaque semaine, la saisie du demandeur avait frappé dans le vide, et que, comme conséquence le tiers-saisi n'était pas tenu de déclarer *de novo*, vu que le salaire non échu du défendeur n'avait pas été saisi, et qu'ainsi l'ordonnance était illégale et émanée sans droit.

De l'autre côté, Me La-Arsène Lavallée prétendit que le tiers-saisi ne pouvait échapper à l'application du statut 51-52 Vict., ch. 24, parce que tout en admettant que le tiers-saisi ne dut rien au défendeur, il admettait néan-

moins qu'il avait été à son service depuis la signification de la saisie-arrêt jusqu'à la date de la signification de l'ordonnance de comparaître *de novo*. En conséquence, le défendeur ayant été continuellement à l'emploi du tiers-saisi, la saisie-arrêt demeurerait tenante de plein droit, et Sager était tenu, sans notification, pour se conformer au statut, de renouveler sa déclaration tous les mois tout le temps que le défendeur serait resté à son service, et ce tant et aussi longtemps que le jugement en capital, intérêts et frais n'aurait pas été éteint.

Le tiers-saisi a eu tort de payer le défendeur en prétendant que le statut ne pouvait avoir d'effet; qu'il ne pouvait en aucun cas avoir d'application, parce que ce serait contredire le paragraphe 5 de l'art. 558 du C.P.C. qui n'avait été ni abrogé ni amendé par le statut de 1888; que ces deux lois étaient une contradiction formelle l'une de l'autre.

Il n'y a pas plus de contradiction entre ces deux lois qu'il n'y a d'amendement ou d'abrogation par le statut de 1888, de l'art. 558 C.P.C., parce que le paragraphe 5 de l'art. 558 s'applique à tous les débiteurs généralement, tandis que le statut de 1888 crée simplement une exception à la règle établie par l'art. 558 : *Les gages et salaires des ouvriers et journaliers, etc.*

Quant à la contestation par le demandeur de la déclaration du tiers-saisi, elle doit être maintenue, parce que Ledoux, étant un *operarius*, ne peut échapper à l'application de la loi de 1888. Les déclarations de Sager font voir qu'il a toujours été à son emploi et payé à la semaine, et l'*operarius*, payé à la semaine, reste sous le coup de la saisie-arrêt, qui est tenante, tant que le jugement n'est pas complètement acquitté s'il continue à travailler pour le même patron. Et Sager n'eût-il pas admis dans ses déclarations que le défendeur avait toujours travaillé pour lui depuis la signification de la saisie-arrêt jusqu'à sa déclaration *de novo*, que la Cour, sans preuve, de plein droit, devrait déclarer que le défendeur a toujours été à son service, parce que le statut force le tiers-saisi, lorsque le défendeur quitte son emploi, d'en venir faire la déclaration au greffe, et il n'a rien fait de tel.

La Cour maintenant totalement les prétentions du demandeur, renvoya la contesta-

tion de l'ordonnance, et donna jugement suivant les conclusions de la contestation du demandeur. Elle décida, en outre, que le défendeur ne fût-il pas un *operarius*, elle condamnerait encore le tiers-saisi parce que dans sa déclaration, il avait failli de se conformer à l'art. 619 C.P.C., en ne dévoilant pas les conditions sous lesquelles le défendeur était à son service.

Greenshields, Guerin & Greenshields, pour le tiers-saisi.

Lavallée & Lavallée, pour le demandeur-constatant.

(L. A. L.)

APPOINTMENT OF QUEEN'S COUNSEL.

[Continued from page 111.]

SIR JOHN THOMPSON: Now, having said that much with regard to the hon. gentleman's contention, which he understood that his argument had established, and which he enumerated among the points which he had established, that Her Majesty is an integral part of the Legislature of the province, let me refer the hon. gentleman to the mistake which, I think, he made, in attributing that as the foundation of the decision in the case of *Lenoir v. Ritchie*. It seems to me, and it has always seemed to me, that the Executive Government, not only of Canada itself but of every one of her provinces, is vested in Her Majesty. It seems to me, that it is perfectly within the competence of a Provincial Legislature, to make enactments binding Her Majesty's prerogative, and binding that prerogative to the fullest extent, but only in regard to matters which are entrusted to the Provincial Legislature under the British North America Act; and this, for the very obvious reason, that, inasmuch as these powers are given to Provincial Legislatures, the Provincial Legislatures cannot fully legislate upon them without binding all the rights which Her Majesty has in regard to them, as well as the rights which Her Majesty's subjects have in regard to them. When we find the power to regulate the civil procedure of the courts entrusted to the Provincial Legislatures, it is surely competent for the Provincial Legislatures to control that Provincial procedure, even though it affects to some extent the use of Her Majesty's name, as, for

instance, in the issue of writs, which the hon. gentleman has referred to as running in Her Majesty's name. It seems to me perfectly within Provincial powers to control and to regulate that procedure, notwithstanding the mere fact that justice is supposed to be administered in Her Majesty's name, and that all who come within her courts are supposed to come at Her Majesty's summons. But the difference between the proposition which the hon. gentleman has laid down, with regard to Her Majesty being an integral portion of the Provincial Legislatures, and the principle which is laid down, rightly or wrongly, in the case of *Lenoir v. Ritchie*, seems to me to have been this: that the respect in which Her Majesty was said not to form a part of the Provincial Legislature by the Supreme Court of Canada, in the case of *Lenoir v. Ritchie*, was this respect, that Her Majesty could not be said to be bound in her prerogative rights, by a Provincial statute, unless the power of a Legislature upon that subject was expressly conferred by the British North America Act. It had been contended there by counsel, for the appellant, that even though the subject dealt with should be the distribution of honors and of titles—of honor proceeding essentially from Her Majesty as the fountain of honor—yet the Provincial Legislature might properly pass a statute binding Her Majesty in respect to the exercise of that prerogative, even though it was not conferred upon them by the British North America Act, on the ground that the Provincial statute being once passed, Her Majesty was bound to yield her prerogative in her assent to that Act. That involved the proposition that Her Majesty was a portion of the Legislature of the Province, and it was in that respect, with regard to the unrestricted legislative powers of the Provinces, that the Supreme Court of Canada, as I understand the decision in the case of *Lenoir v. Ritchie*, held that Her Majesty was not bound by a Provincial statute, and that she did not form part of the Provincial Legislature. The logical result of that conclusion was, not at all as the hon. gentleman seems to suppose, that Her Majesty could not be bound in any of her rights by a Provincial statute, but simply that Her Majesty was not

bound by a Provincial statute, unless that Provincial statute was passed in pursuance of powers conferred on the Legislature by the British North America Act. In the case of a statute passed by this Parliament, or passed by the Imperial Parliament, the result would be different. Her Majesty would be bound, and her prerogative would be yielded by the fact of her giving assent to the Act, irrespective altogether of the powers which the Parliament itself possessed. Now, to show that I am right in supposing that that was the view taken by the Supreme Court of Canada, and that, therefore, the hon. gentleman (Mr. Amyot) was hardly right in impugning that decision, as being erroneous in that respect, I will call his attention to a passage from the judgment of Justice Henry, in which he says :

"The Local Legislatures are now simply the creatures of a statute, and under it alone have they any legislative powers. The Imperial Parliament, by the Union Act, prescribed and limited their jurisdiction; and, in doing so, has impliedly and virtually and effectually prohibited them from legislating on any other than the subjects comprised in the powers given by that Act. The right of the Imperial Parliament, when conferring legislative power on the Local Legislatures, to limit the exercise of them, cannot be questioned; and any local Act passed beyond the prescribed limit, being contrary to the terms of the Imperial Act, must necessarily be *ultra vires*."

A little further on, and toward the conclusion of his judgment, Justice Henry deals directly with that question, of Her Majesty being a portion of the Legislature, in these terms:

"If the Imperial statute has not given the necessary legislative power to the Local Legislatures, an Act of theirs would be of no higher value than a city ordinance, such as I have stated. The argument of this question, however, is unavailable, for the Queen has not signified her assent to the local Act in question. By the provisions of section 90 of the Imperial Act, the Governor General, and not the Queen, assents to local Acts made in his name, as provided. The Lieutenant Governors are appointed, not by the Queen, but by the Governor General in Council. It cannot, therefore, be successfully contended that the Queen has assented to the Local Act in question; nor can it be with greater success contended that by assenting to it the Governor General had any power, in doing so, to interfere with the Royal prerogative."

One other extract from the decision of Mr. Justice Taschereau indicates the same conclusion :

"But, said the appellants, Her Majesty has assented to this Act of the Nova Scotia Legislature. This, in my opinion, is a grievous error. Her Majesty does not form a constituent part of the Provincial Legislatures, and the Lieutenant Governors do not sanction their Bills in Her Majesty's name."

Then he goes on to show that the Bills are not sanctioned by Her Majesty at all. The hon. gentleman, therefore, I think, will see that the heresy which the Supreme Court of Canada was aiming at in the decision of *Lenoir vs. Ritchie* was not at all, in fact, the proposition that the statutes of a Province cannot bind the Crown; but that the Crown is not necessarily bound by the provisions of a Provincial statute by the fact of its being allowed to go into operation, and the Act for its validity and effect on the Crown, must depend on the single consideration whether it is within the powers conferred on the Provinces by the British North America Act. Then the court proceeded to the next step, to consider whether it was within the range of the subjects entrusted to the Provincial Legislatures, and came to the conclusion that the appointment of Queen's Counsel was simply the conferring of a title of honor carrying rank and precedence, and, therefore, was not within the exclusive powers given to the Local Legislatures. Now, the hon. gentleman read to the House a summary of several decisions of Her Majesty's Privy Council, in which the position was laid down, that the Provincial Legislatures have, as the hon. gentleman asserted, a plenitude of powers. I do not for a moment question the force of the decisions referred to. They by no means take the view, that the Provincial Legislatures have any powers, plenary or otherwise, beyond those given to them by the British North America Act. The single effect of all that line of decisions is, that within the powers conferred upon them by the British North America Act, the Provincial Legislatures are supreme in their legislation; but the fundamental question which lies at the base of this whole controversy with regard to the appointment of Queen's Counsel, is, whether it is within Provincial powers or not. If it is within Provincial powers, I admit that those powers are so plenary, that they may supersede the powers which may be vested in the Central Govern-

ment. The hon. gentleman has made reference to the form of the commissions which are now issued, and which the hon. gentleman thinks are ludicrous in their character. I do not profess to be wiser in my generation than all the Attorney Generals who have preceded me, and all those who administered affairs of this kind in the various Provinces of Canada, and I think it will be found that the commission which we have issued is in substantially the same form as that established ever since the appointment of Queen's Counsel has been made by the Federal Government, and is substantially in the same tenor as the commissions issued by the Provincial Governments before Confederation. I think, further, it will be found, on a close comparison of that commission with the commissions that used to be issued by Her Majesty's Government conferring the rights of Queen's Counsel on practitioners in British North America, that the forms of the two are substantially the same. The commission simply confers the title *quantum valent*, and does not profess that the precedence conferred upon the recipient shall justify him in asserting rank or precedence over any class or over any particular number of persons. It assumes that the decisions of the Supreme Court of Canada, when they are announced, are the law of the land, and being so, the precedence is to be regulated by the court to whom the patent is presented, and, in the ordinary course, confers on the recipient the right to rank next to the person who last received the authority. The hon. gentleman impugned the force and effect of the decision in the case of *Lenoir vs. Ritchie*, not only on the ground I have already referred to, that it proceeded on a point which really was not raised in the argument on the appeal, but likewise on the ground that the parties interested had not been heard. I am not able to agree with the hon. gentleman in that view of the case. It might have been more satisfactory if all the Provincial Governments had been invited to take part in that argument, or it might not. The question was raised in the Supreme Court of Nova Scotia between a barrister holding a patent from the Governor General and a barrister holding a patent from the Lieutenant Gover-

nor of the Province. Those two parties were all whose rights were immediately concerned in the subject under controversy. Although, in the litigation of those rights, doctrines of law were laid down which were exceedingly interesting to many persons outside of the immediate litigants, that is precisely the case with every important decision pronounced; and if we impugn the decision of *Lenoir vs. Ritchie* on the ground that every person who took an interest in the subject was not heard, we must take the ground that every decision of the courts of this country and of the mother country is inconclusive in establishing the law because the hon. member for Bellechasse or myself may have had, or intended some day to bring, a suit just like it, and ought to be heard, and, therefore, is not binding on us. Now, in replying to the observations of the hon. gentleman somewhat fully, as I felt bound to do in courtesy to him, considering the care he had bestowed on this subject, and the care and ability with which he brought it before the House, although I have followed him at some length, I do not propose to ask the House, and I hope he will not think of pressing it, for a decision of the legal question by a vote proposed in amendment to going into Supply. I do not propose this afternoon to state, and, I think, I am not called on to state to the House, what my opinion is as to the powers of the Provincial Legislatures or Governments with regard to the appointment of Queen's Counsel. That has been within certain lines decided by the Supreme Court of Canada. All I have ever said, in answering despatches which have come from any of the Provinces in reference to my report, is, that while the decision of the Supreme Court of Canada in *Lenoir vs. Ritchie* exists and remains undisturbed, we must recognise it to be the law of the land within the limits within which it proceeds, not extending those limits; and that, if any person, whether a Provincial or Federal appointee to this office or any other, is of opinion that the case of *Lenoir vs. Ritchie* does not deny the authority of the power which appointed him, it rests with the courts of the country to administer between him and those who contest his rights, the same measure of justice that was meted out

between Mr. Lenoir on the one hand and Mr. Ritchie on the other. I think myself that it would be more convenient to allow these constitutional questions to be settled in that way, unless the actual rights of property of the two Governments are so interfered with by the action of one of them as to make it inconvenient that such action should be allowed to continue in a contestation of the rights which respective parties claim to have, under appointments conferred upon them by different Governments; when, without derogation to the exercise of administrative powers by the two Governments, the questions in dispute can be left to the decision of the tribunals which may be appealed to by those parties. I think it is more simple that they should be left to the tribunals than that we should interfere. For these reasons I do not feel called upon, this afternoon, to assert with any confidence or dogmatism what is my own individual opinion on this point. The hon. gentleman has not been able successfully to question the decision in the case of Lenoir *vs.* Ritchie. While that decision remains unreversed, it ought to be recognised by this Parliament as the law of the land. But the hon. member for Bellechasse (Mr. Amyot) has made an argument to the House in which he claims to have reached the conclusion that the decision of the highest tribunal in this country was wrong in point of law, and he asks the House this afternoon, on amendment to go into Supply, to reverse that decision by its vote. Without, therefore, saying what foundation there may be for the ingenious and able argument the hon. member has advanced, without saying that I am able to concur in any of the points which I may have omitted to answer, from forgetfulness of the hon. gentleman's argument as it fell on my ear, or from the difficulty I sometimes experienced in hearing him—without going further into the matter, I simply ask the House to decline giving an opinion on this question, seeing that it has been decided by the highest court in the country within certain lines and limits, and that, outside those lines and limits, we may leave that question to be pressed to a solution by those directly interested. I would urge on hon. members

that we should pause before undertaking to declare our opinion to-night on a difficult question of law, upon which the courts have differed, and Provincial Governments have differed, and in respect of which, when this question comes finally to be conclusively decided, we might have the mortification of seeing that we had expressed and recorded on our Journals a fallacious opinion as to what the law of the country is.

After some remarks from Mr. Mills the amendment was withdrawn.

RECOMMENDATIONS TO MERCY.

The Crewe murder case was one in which two lads were charged with the murder of their father, who had been guilty of cruelty to their mother. Richard Davies, the elder lad, was hanged April 8. The younger lad was reprieved. The *Law Journal* remarks upon the case:—

The Crewe murder trial has, as might have been expected, ended in a verdict of guilty, accompanied by a recommendation to mercy on the ground of the youth of the prisoners, who are seventeen and nineteen years of age respectively; and this recommendation, together with the ground of it, was no doubt at once 'forwarded to the proper quarter.' The recommendation to mercy is entirely outside the law of England. The judge has no judicial duties in respect of it; and, as far as we have been able to discover, text-writers are silent both as to its history and general practical effect. Sir James Stephen, however ('History of Criminal Law,' vol. ii. p. 89), makes the wise suggestion, 'that improvements might be made in the definition of the offence of murder, which would diminish the proportion of cases in which an interference with the law would be necessary,' and 'is convinced that in regard to capital cases the judge should have a discretion analogous to that which he has in cases not capital,' though he says, 'no one is more opposed than I am to the abolition of capital punishment.' In many foreign countries the question whether or not the punishment of death should be awarded in doubtful cases rests entirely and expressly with the jury. This is notoriously the case in France, Italy, and Russia, while in Geneva the law goes so

far as to recognise a distinction between a verdict of guilty 'under extenuating circumstances,' and one with the words 'under very extenuating circumstances,' the effect of either being to prevent the sentence of death or imprisonment for life being passed, and the punishment being, of course, slighter in case of the latter verdict. In the United States a solution of the difficulty appears to have been pretty generally attempted by a division of murder into murder in the first and murder in the second degree. From the appendix to the report of the Capital Punishment Commission it appears that the youth of the prisoner is recognized as a reason for mitigating the sentence of death in Spain, Saxony, and one of the Swiss cantons; but it has never been expressly recognised in this country beyond the application of the common-law rule that below the age of seven no criminal offence can be committed, and between the ages of seven and fourteen a prisoner is presumed to be incapable of felonious intent until the contrary be proved.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 5.

Judicial Abandonments.

Alphonse Bertrand, hotel-keeper and trader, parish of St. Placide, district of Terrebonne, March 27.

Gilbert Currie Campbell, tinsmith, Ormstown, district of Beauharnois, March 28.

Stanislas Gougeon, butcher, Montreal, March 31.

Louis Pelchat, trader, St. Valier, district of Quebec, March 29.

Curators appointed.

Re Barton & McDonald, auctioneers and commission agents.—P. E. de Lorimier, Montreal, curator, March 28.

Re George Darveau, Quebec.—D. Arcand, Quebec, curator, March 29.

Re Marie Anne Dusault, doing business under name of Gingras & Co.—Bilodeau & Renaud, Montreal, joint curator, April 1.

Re N. Godbout & Co., Montreal.—C. Desmarteau, Montreal, curator, March 28.

Re Joseph E. Lafamme, roofer, St. Henry.—N. P. Martin, Montreal, curator, March 28.

Re Jacques Neveu, Ripon.—Kent & Turcotte, Montreal, joint curator, March 29.

Re Anthime Robert, Upton.—P. Fafard, Upton, curator, March 29.

Dividends.

Re A. Wm. Beattie, Dunham.—First and final dividend, payable April 21, T. F. Wood, Dunham, curator.

Re Rémi Bernard.—First and final dividend, payable April 15, F. X. A. Boisseau, St. Hyacinthe, curator.

Re Bonin & Allaire, Montreal.—Dividend, payable April 23, Kent & Turcotte, Montreal, joint curator.

Re Aldéma Bourbonnais, parish of Ste. Marthe, tanner.—First and final dividend, payable April 28, P. E. de Lorimier and A. Jeannotte, curator.

Re Wm. Doucet, Grande-Piles.—Dividend, payable April 28, Kent & Turcotte, Montreal, joint curator.

Re Georges Duberger.—First and final dividend, payable April 17, Elie Angers, Malbaie, curator.

Re Giguère & Co., Quebec.—Dividend, payable April 28, Kent & Turcotte, Montreal, joint curator.

Re M. Guillet, Three Rivers.—Dividend, payable April 28, Kent & Turcotte, Montreal, joint curator.

Re Francis Lemay, Montreal.—Dividend, payable April 28, Kent & Turcotte, Montreal, joint curator.

Re F. X. Lepage, dry goods, Quebec.—First and final dividend, payable April 21, H. A. Bedard, Quebec, curator.

Re Prosper Philippe Mercier.—First and final dividend, payable April 23, P. S. Grandpré, St. Valérien de Milton, curator.

Re F. X. Sarrasin, Three Rivers.—Dividend, payable April 28, Kent & Turcotte, Montreal, joint curator.

Re Wm. Stanley, book-seller, Quebec.—First and final dividend, payable April 21, H. A. Bedard, Quebec, curator.

Re F. X. Trudeau, Montreal.—Dividend, payable April 28, Kent & Turcotte, Montreal, joint curator.

Separation as to Property.

Filicité Brosseau vs. Vital Robert, parish of St. Philippe, March 29.

Caroline Eno dit Deschamps vs. Isaie Rivet, Montreal, March 28.

Rosina Foreman vs. Wilfrid Leclerc, Montreal, April 5.

GENERAL NOTES.

ENFORCING ENGLISH JUDGMENTS IN ITALY.—The British vice-consul at Venice, in his last report, remarks that cases frequently occur of British subjects having to enforce a sentence in Italy against foreigners obtained from a legally constituted Court in England, commencing proceedings anew in accordance with the local laws, thereby incurring a heavy expenditure, with doubtful prospects of success. It is quite needless to do this, for whenever a sentence against foreigners is legally pronounced by a duly constituted Court in England, the enforcement in Italy may be demanded of the Court of Appeal in the jurisdiction of which the sentence is to be put into execution, on production of the original documents duly legalised by an Italian consul. The Court of Appeal will examine if the sentence has been legally issued, and if all the required formalities with respect to the serving of summonses, &c., have been observed; and, if there is nothing in the sentence against public order or right, the Court will issue a decree giving the same force to the judgment as if it had been delivered by an Italian tribunal. This mode of proceeding, which would appear to be little understood in England, or at least imperfectly resorted to, is called 'Giudizio di Deliberazione.'—*Law Journal*.

The Legal News.

VOL. XIII. APRIL 19, 1890. No. 16.

A recent decision in England by Mr. Justice Kekewich, in the cases of *Simmons v. London Joint Stock Bank*, and *Little v. The Same*, if it be approved by the higher courts, will place an onerous obligation on bankers. The learned Judge has held, in effect, that banks, before making advances to stock-brokers on bonds or other securities payable to bearer, are bound to make inquiry as to whether the securities are actually the property of the persons obtaining the advances. The facts of *Little's case*, as stated by the *London Law Journal*, are these: Little employed a firm of stockbrokers in the city of London to purchase on his account certain bonds, which were, on the face of them, payable to bearer, and which admittedly passed from hand to hand. These bonds he paid for sooner or later, and left with the brokers for safe custody, though apparently with a view to speculation. The brokers, however, deposited the bonds with the bank to secure advances to themselves, and subsequently, but without redeeming them, became defaulters on the Stock Exchange and were adjudicated bankrupts. Under these circumstances Little claimed the bonds, and the bank refused to give them up, and Mr. Justice Kekewich has held that the refusal was not justifiable. The bank, it should be added, knew that the persons making the deposit were stock brokers, and they never inquired whether the bonds were the brokers' own property, and in all probability they knew that it was the practice of some brokers in the city of London to deposit a number of securities *en bloc* to cover the whole of a loan made to themselves. Bankers certainly will be strongly opposed to having the duty of investigation thrust upon them. As a bank officer stated in another case, the result of such an inquiry would be to offend an honest customer, while a dishonest one would readily answer that the securities were his own property. Then] he question

would come up, what amount of research on the part of the bank would be deemed sufficient. It is expected that the question will be carried to the highest Court.

Riggs et al. v. Palmer et al., before the New York Court of Appeals, is fortunately a rare case in the complex record of litigation. The question was whether a murderer can inherit his victim's property. A lad, sixteen years of age, who was aware that his grandfather had made a will in his favor, poisoned the old man in order to get the bequest at once. For this crime he was tried, and convicted of murder in the second degree, and when the action was commenced he was serving his sentence in the State Reformatory. The action was brought by two of the testator's children, to have the provisions of the will in favor of the youthful murderer, cancelled and set aside. The first Court dismissed the action, and from this judgment an appeal was taken to the New York Court of Appeals which reversed the decision, Gray and Danforth, JJ., dissenting. In our own Code we have an article (610), copied from Art. 727 of the Code Napoleon, based upon the Roman law, which excludes from successions, (1) The heir "who has been convicted of killing or attempting to kill the deceased;" also (3) The heir of full age, who, being cognizant of the murder of the deceased, has failed to give judicial information of it." The New York Court were without any positive text of law to go upon, and were forced to admit that the statutes regulating the devolution of property, if literally construed, gave the inheritance to the murderer. They were forced to reason as follows: "It was the intention of the law makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative, should have any benefit under it." They cited 1 Blackstone Com., 91, where the author, speaking of the construction of statutes, says: "If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. . . . When some collateral matter arises

out of the general words, and happens to be unreasonable, then the judges are, in decency, to conclude that this consequence was not foreseen by Parliament."

The office of permanent principal or dean of McGill law faculty, as re-organized under the McDonald endowment, has been offered to Mr. N. W. Trenholme, Q. C., and accepted by him. This is a good selection, and augurs well for the success of what will now be really a school of law. The remuneration attached to the office is, we believe, the same as that received by Mr. Marsh, of the Toronto school, viz., \$4,000 per annum. The holding of this office involves the relinquishment of practice at the bar.

COURT OF QUEEN'S BENCH — MONTREAL.*

Insolvency — Claim against insolvent — Notes held as collateral security — Collocation.

Held:—(Reversing the judgment of the Court of Review, M.L.R., 2 S.C. 338), That a creditor who holds notes or merchandise as collateral security, is not entitled to be collocated upon the estate of his debtor in liquidation, under a voluntary assignment, for the full amount of his claim, but is obliged to deduct any sums he may have received from other parties liable upon such notes, or which he may have realized upon the goods; and it does not matter at what time such sums have been received on account, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made. *Thibaut & Benning*, Dorion, Ch. J., Tessier, Cross, Bossé, Doherty, J.J., Jan. 25, 1889.

Quantum Meruit—Remuneration of Liquidator —Petition for Discharge.

Held:—1. That the Court, in taxing the remuneration of a liquidator to an insolvent company, will take into consideration the nature of the services rendered; and where it appeared that the services for the most part were such as might have been performed by any ordinary competent book-

keeper, it was held that \$7 per day was an adequate remuneration.

2. Where the liquidator petitioned for his discharge as liquidator, and it appeared that he had appropriated to himself, from the funds received, an amount exceeding the remuneration fixed by the Court, and the evidence did not disclose the exact amount in which he was indebted to the estate, the Court refused to grant his discharge, without fixing any amount to be paid by him as a condition of obtaining his discharge.—*Plender & Fitzgerald*, Dorion, Ch. J., Tessier, Cross, Bossé, Doherty, J.J., Nov. 27, 1888.

Sale—Agent—Quantum Meruit—Commission.

The appellant charged the respondent with the sale in his behalf of certain real property, and it was agreed that he should have three months to effect a sale. A few days before the expiration of the three months the appellant exchanged the property for another, owned by his brother-in-law, receiving \$4,200 to boot, and the brother-in-law sold the same property for \$10,700.

Held:—1. That the property having been alienated by the appellant before the expiration of the three months, the respondent was entitled to the usual commission of 2½ per cent. on the value obtained, although it did not appear that he had done anything to facilitate the disposal of the property.

2. That the exchange being an alienation equivalent to sale, the respondent was entitled to his commission upon the whole value, \$10,700, and not merely upon the \$4,200 received to boot.—*Carle & Parent*, Dorion, Ch. J., Tessier, Cross, Bossé, Doherty, J.J., Jan. 19, 1889.

Costs—Appeal on question of—Tender—Recovery of portion of amount sued for.

Held:—1. An appeal will be entertained on a question of costs where the Court below, in adjudicating on the costs, proceeded upon a wrong principle. (See *Prowse & Nicholson*, M. L. R., 5 Q. B., p. 151.)

2. The plaintiff sued for \$774 and the defendant tendered \$334, but without costs. The plaintiff proceeded with the suit for the whole amount, and the tender was held suffi-

* To appear in Montreal Law Reports, 5 Q.B.

cient as to principal; *held*, that the plaintiff should be condemned to pay all costs after filing plea, including costs of *enquête*.

3. A judgment which condemns the plaintiff who succeeds for part of the amount sued for, to pay the defendant costs of contestation as of an action for a sum representing the difference between the amount sued for and the amount recovered, is erroneous in principle, and such an adjudication as to costs is not within the discretion allowed the Court by Art. 478, C. C. P. *McCartney & Linsley*, Dorion, Ch. J., Cross, Baby, Church, JJ., Feb. 25, 1888.

COUR DE MAGISTRAT.

MONTRÉAL, 21 juin 1889.

Coram CHAMPAGNE, J. C. M.

BRIEN dit DUROCHER v. DUFRESNE.

Vente—Hypothèque—Crainte de trouble—Droit de l'acheteur—Capital et intérêts.

Jugé:—Que l'acheteur d'immeuble qui a raison de craindre d'être troublé dans sa possession par suite d'une hypothèque qu'il découvre sur la propriété par lui achetée, a droit de retenir le capital dû jusqu'à ce que la cause de trouble disparaisse, mais il ne peut se refuser de payer les intérêts qui deviennent échus sur le capital non payé.

*Pier CURLIAM:—*Le demandeur a vendu un lot, dans la cité de Montréal, au défendeur pour le prix de \$600, payable \$100 par paiements de \$25 chacun tous les trois mois, et la balance de \$500 après un délai de six ans, avec intérêt sur le tout du jour de la vente, lequel intérêt payable tous les six mois.

L'action est pour un paiement de \$25 sur le capital et de plus \$22 pour intérêts échus.

Le défendeur plaide qu'il craint, avec raison, d'être troublé; qu'il existe une hypothèque de \$600 sur son lot et trois autres lots qui appartiennent encore au demandeur, et qu'il ne peut pas être tenu de payer, sans qu'il y ait main levée de cette hypothèque, ou que caution lui soit donnée qu'il ne sera pas troublé.

Le défendeur ne peut être tenu de payer le capital tant qu'il n'y aura pas main levée de l'hypothèque, à moins que caution lui soit donnée qu'il ne sera pas troublé. Mais le

défendeur ayant la possession du terrain, il doit payer les intérêts réclamés et qui sont dûs sur son prix de vente, la crainte d'être troublée ne se rapportant qu'au capital. Il y aura donc jugement pour le montant réclamé avec sursis à l'exécution, pour le montant de \$25 jusqu'à ce que caution soit donnée ou que la cause du trouble ait cessé, avec dépens d'une action de moins de \$25.

Autorités: C. C. 1535, 1576; 27 L. C. J. 358; 7 L. C. J. 32; 9 L. C. R. 310; 21 J., 101; 21 J., 253; 4 Leg. News, pp. 45, 55; 25 J., 22.

Bérard & Brodeur, avocats du demandeur.

Mercier, Beausoleil, Choquette & Martineau, avocats du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, 21 juin 1889.

Coram CHAMPAGNE, J. C. M.

MARSOLAIS et al. v. DAME PERRAS et al.

Bref—Mari et femme—Amendement.

*Jugé:—*Que dans une action où la femme est poursuivie personnellement et où le mari est mis en cause, mais seulement pour autoriser son épouse, une motion demandant à amender le bref et la déclaration de manière à mettre en cause le mari personnellement comme défendeur, l'omission du nom du défendeur dans le bref est une nullité absolue que la Cour ne peut rectifier. C. P. C. 49 et 51.

Amendement refusé.

Ethier & Pelletier, avocats des demandeurs.

Beïque, Lafontaine & Turgeon, avocats des défendeurs.

(J. J. B.)

LORD SELBORNE AND THE HOUSE OF LORDS.

The Earl of Selborne has written as follows to a correspondent of the *Times* who drew his attention to Lord Rosebery's proposal—"That a peer ought to be given the choice of whether he wishes to enter the House of Lords or not, and that, if he has not had that choice originally, he should have the option of whether he wishes to remain there or not"—and asking whether his lordship did not consider that the proposed reforms were not only unnecessary, but would weaken the

House of Lords: "Blackmoor, West Liss, Hants: February 13.—Sir,—In reply to your letter of yesterday, I have to say that I do not agree with those who think that the change, in approval of which Lords Derby and Rosebery and Mr. Morley seem to concur, would weaken the House of Lords. As to its necessity I can say nothing, but if the constitution of the House of Lords is to be altered, I think this is one of the changes which might be expedient. Lord Derby mentions some cases in our past history in which it would have been very convenient (in contingencies which might easily have happened) if succession to a peerage had not removed a leading man from the House of Commons, and at the present moment Lord Hartington's case is at least equally in point. Irish peers eligible to be representative peers for Ireland have sat and exercised great influence in the House of Commons—*e.g.* Lord Palmerston and Lord Londonderry (best known as Lord Castlereagh). To have leading men of its order removed of necessity from the House of greatest power and political influence does not seem to me to be a source of strength to the House of Lords. If young, they are more likely to be actively useful in the House of Commons, and after they have served their time there they will naturally go (as Lord Russell and as many more have done) to the House of Lords and bring with them more strength. Of course, every plan for changes in such an institution as the House of Lords is open to objections; the question is, on which side the reasons preponderate.—I am, sir, your obedient servant, SELBORNE."

BILLS AND NOTES.

The following extract from the official report of the debate in the Senate, April 10, is of interest:—

On clause 51 of the Bill relating to Bills of Exchange, Cheques and Promissory Notes:

Hon. Mr. DRUMMOND—Why should there be any distinction made between the Province of Quebec and other provinces in the noting and protesting of an inland bill for non-acceptance and payment? I heard the opinion expressed within the last day or two,

by a judge of the Province of Quebec, that it was injudicious and improper that there should be any distinction made. I submit that what is sufficient for one province ought to be for the others.

Hon. Mr. POWER—I presume the secret of it is, that the notarial body is a very large and influential one in the Province of Quebec, and is also well represented in the House of Commons, and they have taken care that their fees shall not be taken away from them.

Hon. Mr. ABBOTT—The people of Quebec desire to have their law as it is, and it seems to me, as it is only a matter of procedure and not of law, it is desirable to keep it as it is. It is a process that their forefathers have been accustomed to for centuries; they wish to retain it, and I can see no objection to allowing them to do so.

Hon. Mr. PELLETIER—I must believe the hon. gentleman from Montreal when he says that a judge there expressed the opinion that there should be no difference in the law in the Province of Quebec and elsewhere; but I am sure that the judge does not represent the opinion of the province or of the Bar of the province. I remember an occasion when an attempt was made to have a change in the law of Quebec in this respect, and not only the members of the Bar, but the Bench also, were opposed to it.

Hon. Mr. KAULBACH—It is desirable to have the law uniform—not only the law but the procedure.

Hon. Mr. PELLETIER—Then make it as it is in Quebec, and we will have no objection to it.

Hon. Mr. BOLDUC—I have now heard for the first time that a judge has made objections to the practice in the Province of Quebec. I have, on many occasions, heard those gentlemen state that the commercial law of Quebec was the best that could be had anywhere. Our people are used to the law as it exists in the province, and the slightest change would work very prejudicially against them.

Hon. Mr. REMOR—Will the hon. gentleman explain why notarial fees are more than

twice as high in the Province of Quebec as they are in the Province of Ontario?

Hon. Mr. BOLDUC—That is a matter of detail. I do not think they are double, but protests are not so numerous in our province as in other provinces, in consequence of the high notarial fees.

Hon. Mr. ABBOTT—My hon. friend will perceive that in Quebec the notarial profession is a learned profession by itself. In the other provinces any one may be a notary; it is an incident generally to some other profession, and there is no reason for paying a high price for services which are almost mechanical. There is no reason for making the same charges in the other provinces that prevail in the Province of Quebec.

Hon. Mr. SCOTT—Will my hon. friend explain why those words are introduced in clause 51—"but it shall not, except in the Province of Quebec, be necessary to note or protest any such bill in order to preserve the recourse against the drawer or endorser." How is the drawer or endorser to be held unless he is notified?

Hon. Mr. ABBOTT—I put that question to those who drew the Bill, and the explanation is satisfactory to a certain extent. There is another clause in the Bill which provides that if an inland bill is dishonored notice must be given to the endorser and the drawer, but they do not insist on the formality of a protest. That is what is dispensed with in the practice in Ontario. Noting means notarial notation, which is completed by protest.

Hon. Mr. SCOTT—I think those words are simply confusing.

Hon. Mr. ABBOTT—I propose to add after the word "but," in the third line, "subject to the provisions of this Act with respect to notice of dishonor."

Hon. Mr. SCOTT—The clause means nothing, and should be struck out altogether.

Hon. Mr. ABBOTT—This clause deals with the protesting of bills, and it says that inland bills need not be protested. I understand that that is the law in England, and it makes the law uniform throughout the provinces, except the Province of Quebec.

Hon. Mr. RAMSAY—The notice of dishonor

would not entail the expense of a notarial protest.

Hon. Mr. ABBOTT—It would not. The amendments I propose to make to this clause are, after the word "but," in the third line, to add "subject to the provisions of this Act with respect to notice of dishonor."

Hon. Mr. POWER—That is clear from the provisions of the Act.

Hon. Mr. ABBOTT—My theory about legislation is that we should endeavor to put it in such a form that persons will not be liable to be misled by it. I must confess that I was misled by this for some time, and imagined that the bill rendered it unnecessary to take any proceeding whatever with regard to inland bills of exchange, and one would naturally think so, reading the clause by itself. Therefore, as this amendment will make it quite clear, I think it will be better to adopt it.

The amendment was adopted.

Hon. Mr. SANFORD—Do I understand that the portion referring to the Province of Quebec is struck out?

Hon. Mr. ABBOTT—No. Why should my hon. friend take such an interest in the Province of Quebec?

Hon. Mr. SANFORD—I take a considerable interest in the Province of Quebec. If this exception is permitted, anyone whose business extends to the Province of Quebec would have to keep in his employ somebody specially to watch these matters in that province. We are legislating for the Dominion, and I cannot see why a law which is applicable to the other provinces should not be suitable for the Province of Quebec. I am not alone in taking this view of it. Many who are doing business in different sections of Canada feel as I do on this question. If we have one uniform law for all the provinces we will avoid serious mistakes and embarrassing losses.

Hon. Mr. ABBOTT—I hope my hon. friend will move that inland bills be protested notarially in other provinces as well as in Quebec. I think it is a better system. There is really no change in the principle of the law whatever. It is only a minor proceeding, and I do not see why we should not indulge the Province of Quebec in this mat-

ter. I should like to know whether I am expressing correctly the feelings of representatives from Quebec in saying that they desire to retain this mode of procedure in the event of a bill being dishonored. I think it is hard to deny it to them, inasmuch as it does not materially affect the other provinces.

Hon. Mr. DRUMMOND—It is quite impossible to say that a special regulation affecting Quebec does not affect other parts of the Dominion. In this case the notarial protest should be dispensed with if it is found unnecessary elsewhere. If the suggestion of the hon. leader of the House, that the other parts of the Dominion should adopt this system of notarial protest, were to prevail, it seems to me that the tail would wag the dog. I am of opinion, not having any interest in notarial fees or legal expenses, that the parts of the clause referring specially to the Province of Quebec should be omitted.

Hon. Mr. KAULBACH—The object of this Bill is to harmonize the commercial law as far as possible throughout the Dominion. I do not see why Quebec could not come under the general law which applies to all the Dominion. Commercial law should prevail uniformly in all the provinces, and I do not think that Quebec would be much opposed to such legislation.

Hon. Mr. POWER—This requirement, that not only shall notice be given by a holder of the bill, but that he shall go to a notary and get him to make an official protest, is simply a sort of trap to the unwary creditor, and I can readily understand that a business man residing in another province, to whom an inland bill becomes due from some one in the Province of Quebec, and payable in that province, may very likely be misled, may act upon the law as it is in his own province and find afterwards that, according to the law of the Province of Quebec, he should have employed a notary and had the bill protested. There is a very serious objection to maintaining this exception in the bill. I cannot, for the life of me, see how a debtor in the Province of Quebec should feel aggrieved, because he will be relieved, if this provision is stricken out, from the neces-

sity of paying the notarial fees in addition to the amount of the bill. I quite agree that it will more or less diminish the emoluments of a very respectable class of the community in the Province of Quebec, but I do not know that we are just now bound to consider them, and the argument of the hon. gentleman that this has been the law in the Province of Quebec for a long time does not seem to have much force.

Hon. Mr. ABBOTT—Both of my hon. friends mistake the application of the theory they advance. They say that commercial law ought to be the same throughout the Dominion. The commercial law is made uniform by this Act; the obligations and remedies are the same throughout the whole of the of the provinces; but in Quebec, if the parties are sued they are sued in a different manner from that which is recognized in the Province of Ontario. They are charged a smaller amount of costs considerably in the Province of Quebec than in Ontario, when they are sued. There are various other particulars which follow the dishonor of a bill, but the obligations of a party are the same. The same argument which my hon. friends use for the purpose of having the notarial system of Quebec upset as regards promissory notes would apply to proceedings before the courts.

Hon. Mr. POWER—We have nothing to do with that.

Hon. Mr. ABBOTT—When my hon. friends object to this provision with regard to protesting they are not objecting to any difference in the commercial law, but to a difference in procedure. If it is the desire, as I really think it is the almost unanimous desire, of the Province of Quebec, to preserve the existing procedure intact, we do not concede anything by allowing them to do so. If a man in another province does not wish to pay two or three shillings more for a protest in the Province of Quebec he need not deal with anyone in Quebec. I do not suggest that there should be a cessation of commerce between the provinces, because it costs more for a protest in Quebec than elsewhere, but while we claim that the law shall be the same as far as is practicable throughout the Dominion, I do not think that a slight change in the procedure is worth quarreling about.

Quebec desires to keep its system of protest, and I think it would be seriously aggrieved if we were to take it away from them.

Hon. Mr. KAULBACH—If it is only a slight change of procedure, the gentlemen of the notarial profession in Quebec will be more ready to yield to the general law of the Dominion. We are here to legislate for the whole Dominion; to make an exception will only lead to confusion.

Hon. Mr. ABBOTT—This is not a change in the law; it is keeping the law as it is.

Hon. Mr. KAULBACH—But the object of this Bill is to make this law uniform, as far as possible.

Hon. Mr. LOUGHEED—It appears to me that this exception is extending to the notarial profession of Quebec a consideration that is not shown to the professional men of the other provinces. Consequently I think the same consideration should be extended to the members of the profession in the other provinces.

Hon. Mr. KAULBACH—You would make the other provinces subject to the law of Quebec.

Hon. Mr. LOUGHEED—I am strongly in favor of the suggestion thrown out by the leader of the House, that we should make the Quebec system uniform throughout the Dominion.

Hon. Mr. KAULBACH—Though I am a lawyer, I do not approve of that.

Hon. Mr. POWER—If there is a risk of destroying the Confederation we should not protest any further against this exception; but I think the leader of the House rather misrepresents the position taken by those who are opposed to his view. The opposition is not based chiefly on the fact that the fees of notaries in Quebec are higher than the fees of notaries elsewhere, but that certain things must be done in order that the holder of a note may recover on it in the Province of Quebec, and this difference makes a sort of trap for the holder.

Hon. Mr. SCOTT—I drew attention to the fact that it would be very much better if the law were uniform throughout the whole Dominion. I cannot, however, forget that the practice in Ontario, at all events, is that all inland bills are protested. The banks in-

variably protest—that is where 99 per cent. of the protests come from. If a man wants a bill protested he hands it in to a bank. Therefore I do not see very much after all in the exception in favor of Quebec. It is only important with respect to the amount of the fees charged.

CRUELTY TO ANIMALS—DEHORNING OF CATTLE.

A case important to farmers was heard by Messrs. Boright, Pettes, Shufelt and Miller, J. P.'s, at Sweetsburg recently. In January last Mr. J. L. Shepard of Abercorn had his herd of twenty-five cattle dehorned. The story of the operation was reported to the society in Montreal for the prevention of cruelty to animals, and Mr. Shepard was prosecuted. The society produced two veterinary surgeons who gave evidence strongly against the practice, which they held to be cruel. For the defence, several farmers gave evidence to the effect that they had tried dehorning with success, that the cattle operated upon had not been injured, and had rallied immediately after the operation and thrived better thereafter. They expressed the opinion that the pain of dehorning is not more severe or protracted than that connected with the extraction of teeth. Several witnesses swore that defendant Shepard's herd improved wonderfully since the operation. Mr. Racicot read to the court Dr. Cresswell's report of a series of dehorning experiments made in the West, in which the doctor described the operation as brief and only temporarily painful, and stated that the animals seemed to suffer no pain or inconvenience afterwards. The operation in each case lasted about ten seconds. The doctor related one instance where a young cow was drinking at a trough when she was tied up and dehorned. The operation over, she shook her head and returned to the trough to finish slaking her thirst. Prof. Henry, Prof. Chamberlin and other western authorities were quoted to the effect that the practice prevails and is rapidly increasing in the West, with uniformly good results. From actual experiments those authorities agree that the operation instead of being cruel is really merciful to the animals themselves,

because it prevents their hooking and injuring each other. A herd of dehorned cattle is as gentle as a flock of sheep. In the West dehorning is practised largely on account of safety and economy. A herd of cows was tested a week before and a week after dehorning, and the milk flow showed no falling off after the operation. Mr. J. E. Martin summed up the case for the society and Mr. Racicot for the defence. The court, after a brief deliberation, dismissed the action with costs against the society.

WEDDING PRESENTS.

Mr. Montagu Williams is reported to have recently laid down that wedding presents cannot be recovered back by the giver from the receiver, in the event of the wedding in view of which they were given not taking place. This may seem very hard in some cases, as where family jewels or other heirlooms have been presented, or where the receiver breaks off the marriage without any cause whatever just before the day appointed for it. But whether hard or not, is it good law? We very much doubt it. Lord Hardwicke in *Robinson v. Cumming*, 2 Atk. 409, laid down that 'if a person has made his addresses to a lady for some time, upon a view of marriage, and upon reasonable expectation of success makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him; but where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favour, such person is to be looked upon only in the light of an adventurer, and, like all other adventurers, if he will run risks, and loses by the attempt, he must take it for his pains.' As the defendant in *Robinson v. Cumming* was an adventurer, and was not allowed to have his presents back, we have only an *obiter dictum* here, but it is an *obiter dictum* of great weight, and we incline to the opinion that an action would lie to recover presents given in expectation of a marriage which did not take place, as for a gift upon a condition subsequently unfulfilled.—*Law Journal* (London).

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 12.

Judicial Abandonments.

Demers & Riverin, Quebec, April 8.

Malcolm MacCullum, shoe-dealer, Lachute, March 28.

Curators appointed.

Re Dame Hilda Andrews.—W. A. Caldwell, Montreal, curator, April 8.

Re Gilbert Currie Campbell, tinsmith, Ormstown.—H. Hartland, Ormstown, curator, April 5.

Re Evariste Drouin, grocer, Quebec.—H. A. Bedard, Quebec, curator, April 8.

Re André Dubrule.—C. Desmarteau, Montreal, curator, April 8.

Re Stanislas Gougeon.—C. Desmarteau, Montreal, curator, April 9.

Re Edouard St. Cyr, Ste. Clothilde de Horton.—J. E. Girouard, Drummondville, curator, April 5.

Dividends.

Re L. A. Dansereau, Montreal.—First and final dividend, payable April 28, J. McD. Hains, Montreal, curator.

Re David Rea.—Second and final dividend, A. F. Riddell and T. Meredith, joint curators, April 12.

Re Michel Tessier.—First and final dividend, A. F. Riddell, Montreal, curator.

Separation as to property.

Dina Dubois vs. Auguste Mérimée, Montreal, April 8.

Céline Duval vs. François Xavier Sarasin, Three Rivers, April 8.

Sophie Lefebvre vs. Ernest V. Brosseau, Montreal, April 5.

GENERAL NOTES.

COURT BIBLES.—The health authorities of Philadelphia have been invoked to put a stop to the custom which prevails in the courts of taking the oath by kissing the Bible. The law provides that persons may be sworn either by kissing the book or by holding up the right hand; but in Philadelphia the former procedure is the usual and accepted form. It is complained that the Bible in use is generally a very dirty one, and that the promiscuous smacking of a soiled and salivated book is an unclean and disease-breeding practice that ought to be abolished.

PROFESSIONAL ADVERTISING.—A novel design in professional advertising has been sent to us. It is a card of a solicitor with the portrait of a good-looking, well-dressed gentleman on one side, with "My Advocate" beneath, and P. T. O. in the corner. On the other side are the name and address appertaining to the portrait.—*Law Times* (London).

UNCLAIMED WEALTH.—The recent conversion of British consols revealed the fact that there was a large amount upon which interest was unclaimed, and some for the principal of which there were no owners at all. The replies to circulars showed that hundreds of stockholders were dead, many were reminded of stock that they had forgotten, while others were made aware for the first time that they had money in the funds. After a thorough sifting of the matter it was discovered that no owners could be found for the great sum of \$40,330,705.

The Legal News.

VOL. XIII. APRIL 26, 1890. No. 17

A question of considerable importance is discussed in *Allen & Hanson*, reported in the present issue. It is the first case, since the 47 Vict. (D.) ch. 39, amending the 45 Vict. (D.) ch. 23, in which the right to appoint a liquidator in Canada to a company incorporated in Great Britain, has been impugned, and it raises directly the question whether the Parliament of Canada exceeded its powers in passing the amending Act. The case of the *Briton Medical Company* may be mentioned as one in which a liquidator was appointed in Canada to an English company, but in that instance no objection was taken. *Merchants' Bank of Halifax v. Gillespie* (10 (an. S.C.R. 312) was a case before the 47 Vict. ch. 39, was passed, and the only question that had to be decided there was whether the 45 Vict. ch. 23, applied to a company incorporated in England. The Supreme Court held that the Act did not apply to such company, but two of the judges—Justices Strong and Henry—expressed the opinion, which in that case was *obiter dictum*, that the Dominion Parliament had no power to pass a law affecting the rights of shareholders incorporated under an Imperial Statute. Mr. Justice Cross in the present case of *Allen & Hanson*, takes the same ground, but the majority of the Court hold that a liquidator may lawfully be appointed under the Canadian Statute, which in this respect was not *ultra vires*. In view of the conflict of opinion the case naturally proceeds to the Supreme Court, where it will probably be argued in May.

Proudfoot v. Newton, (59 Law J. Rep. Q. B. 129), says the *London Law Journal*, will long be resorted to as an authority for the meaning of 'good tenantable repair' in contracts of tenancy. It was there held that an outgoing tenant under a contract to leave a house at the end of a three years' tenancy is liable both for commissive and permissive waste, but need not repair anything worn out by age, so

that he need not put up new wall papers where the old ones have worn out, nor repaint inside woodwork where painting is decorative only, and also that he need not clean or scour wall paper or whitewash ceilings. The Court has, in fact, drawn a sharp distinction between 'tenantable' and 'decorative' repair, and held that the latter kind of repair cannot be thrown upon a tenant unless it be expressly stipulated for, as it very frequently is, by an express undertaking to paint and paper every seventh year, or in the last year of the term. The official referees generally, it was stated in the argument, had not drawn this distinction, taking perhaps the very tenable view that by 'tenantable repair' is meant such a state of repair as would enable a landlord to relet a house at the same rent without being previously obliged to re-paper and repaint. But this view must now conclusively be taken to be a wrong one.

COURT OF QUEEN'S BENCH.

QUEBEC, February 7, 1890.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, BOSSÉ, JJ.

HARRY ALLEN (*petitioner in Court below*), Appellant; and CHARLES A. HANSON et al. (*liquidators*), respondents; and THE SCOTTISH CANADIAN ASBESTOS CO. (Limited), Insolvent.

Constitutional Law—Winding-up Act, 45 Vict. (D.), ch. 23—47 Vict. (D.), ch. 39; R.S. ch. 129, s. 3—*Liquidation*.

Held :—(CROSS, J., diss.) 1. *That a company incorporated under an Imperial Act, but doing business in Canada, can be wound up under the Canadian Winding-up Act as regards its assets in Canada, and that the 47 Vict. (D.) ch. 39 (R.S. ch. 129, s. 3), which provides that the Winding-up Act applies to incorporated trading companies "doing business in Canada, wheresoever incorporated," is not ultra vires of the Dominion Parliament.*

2. *Where a liquidator to the company was appointed in Scotland, and subsequently another liquidator was appointed in Canada under the Dominion Winding-up Act, that objection to the Canadian appointment*

could not in any case be properly made by a shareholder, but by the Scotch liquidator only.

The appeal was from two judgments rendered by the Superior Court, district of Arthabaska (Billy, J.) May 7, 1889, appointing a liquidator to the estate of "The Scottish Canadian Asbestos Company (Limited)," under the provisions of the Winding-up Act, R.S., ch. 129, and rejecting the motion of the appellant made at the meeting of creditors held before the Court, to suspend and dissolve the proceedings.

Leave to appeal from these judgments was granted on the 21st of May, 1889.

Two "Winding-up Orders" were applied for in this matter; one was granted on the 19th of February, 1889, by Mr. Justice Plamondon, on the petition of Lucke & Mitchell; the second was granted on the 24th of March, 1889, on the application of James Baxter *et al.*, by Mr. Justice Billy.

At the first regularly convened meeting of the creditors of the company, the appellant, who is owner of stock in the company to the extent of £14,800 sterling, objected to the proceedings under the Canadian Winding-up Act, and petitioned to dissolve the proceedings, on the ground that the Court had no jurisdiction, that the Company being incorporated under the Imperial Joint Stock Companies' Act, could not be wound up under the Canadian Act, and he opposed the appointment of a liquidator. The appellant's motion was as follows:—

"That inasmuch as the said Company was 'incorporated under the provisions of the 'Joint Stock Companies' Act of the United Kingdom of Great Britain and Ireland, and is subject to the provisions of the said Imperial Act as regards its status, powers, and franchises, and the rights and obligations of shareholders and contributors, and as regards all matters respecting its corporate capacity; and inasmuch as the said Company is subject to the laws of the United Kingdom of Great Britain and Ireland, as regards its liquidation; and inasmuch as the Winding-up Act of the Dominion of Canada does not apply to the said Company; and inasmuch

"as the said Winding-up Act, and all legislation of the Parliament of the Dominion of Canada, in so far as it relates or applies to the liquidation of the said Company, is *ultra vires* of the said Parliament of the Dominion of Canada; that the present meeting of creditors be dissolved, and that the winding-up order and all proceedings had herein be set aside and declared irregular and of no effect, saving to the said Company and its shareholders and creditors, all rights to which they may be by law entitled."

The judgments merely rejected this motion, and appointed Charles A. Hanson and Edwin Hanson liquidators.

The principal question raised by the present appeal is whether the Company incorporated under the Imperial Act can be wound up under the Canadian Act, and whether the legislation of the Canadian Parliament providing therefor is within the powers of Parliament.

Cross, J. (*diss*):—

On the 7th May, 1889, Mr. Justice Billy, holding the Superior Court at Arthabaska, granted the petition and motion of G. Lucke *et al.*, creditors, for the appointment of a liquidator to the Scottish Canadian Asbestos Company, limited, and thereupon appointed Charles and Edwin Hanson of Montreal, liquidators.

At the same time the same learned Judge rejected a motion made by the appellant Harry Allen to dissolve the proceedings.

From these judgments or orders Harry Allen has instituted the present appeal.

It appears by the record that the Scottish Canadian Asbestos Company (Limited) is a Joint Stock Company, incorporated under the Acts of the Imperial Parliament of 1862 and 1886, having its head office at the City of Glasgow in Scotland, its principal business having been carried on at Arthabaska in Canada, where its chief property and interests are situated, and that it has become insolvent, and that proceedings have been taken in Scotland for the winding up of its affairs, which has been ordered, and a liquidator appointed there before proceedings to that end were taken in Canada; also that Allen the appellant, a resident of New

York, U. S., is a large owner of shares in the company.

It further appears that the Scottish Canadian Asbestos Co. (Limited) obtained supplementary letters-patent from the Lieutenant Governor of the Province of Quebec, under Art. 4764 of the Revised Statutes of Quebec, and that the liquidator named in Scotland, acquiesces in the proceedings taken here under the Quebec Act.

The questions that arise under this appeal are:

1. Which of the liquidators have legally the control and possession of the assets and rights of the Scottish Canadian Asbestos Co. (Limited) in the Province of Quebec.

2. Whether the appellant Allen has the requisite quality or capacity to raise the question.

On the first question. A most reasonable rule, approved of by a number of authors of reputation, is that whether of companies or individuals when assets are principally in one jurisdiction and the domicile of the Company or owner of the estate to be wound up is in another, there should not be two insolvencies or winding-up proceedings, but that the domicile of the debtor should be the place where the winding-up proceedings should be carried out, and the courts of the country where the assets may be found should by comity recognize the title of the, to them, foreign liquidators and give effect in proceedings at his instance to realize the assets. It is generally conceded that this doctrine is qualified by an opposite rule when the question relates to lien or privilege affecting the property in the jurisdiction where found. All such liens, privileges or priority of right existing in the jurisdiction where the property may be placed have to be determined and enforced according to the law of that locality. The foreign liquidator cannot claim the property except subject to such priority. The local law with regard to priority of registration is also binding on the foreign liquidator.

The rule accords with the decisions of the courts in England and Scotland, not taking into account the jurisdiction which the statutory law there may have given the courts over foreign residents when found in

England. See 3 Burges, Foreign and Colonial Law, pages, from 904 to 914 inclusive, and reference there to Lord Loughborough's opinion in *Hunter v. Potts*, 4 Phillimore, p. 544. Westlake (ed. 1880), pp. 142 and 125; Lawrence's Wheaton, p. 144 *et seq.*; Savigny, pp. 258 and 259, pp. 567 and 372 *et seq.* A. pp. 335 and 253. Bell's Commentaries on the Laws of Scotland, Vol. 2, p. 681, *et seq.*; Fiore, Droit International Privé, p. 568, *et seq.*, Nos. 373 *et seq.* to 378.

The rule above stated does not apply where there is a local law in conflict with its operation.

By Sect. 3 of Cap. 129 of the Revised Statutes of Canada, the law for the winding up of companies is made to apply to companies doing business in Canada wheresoever incorporated. There is no doubt the Scottish Canadian Asbestos Company (Limited) is included in this provision. It may, however, be a question whether this is a conflicting law, and whether if it be so it is *ultra vires* of the Dominion Legislature. As regards its being a conflicting law it may be urged with much reason that there cannot be two separate jurisdictions exercising the same functions simultaneously in the particular individual case. There is a possibility, however, of the one acting as auxiliary to the other, and until the objection was raised there could be no doubt that the local jurisdiction here could be availed of.

If even the liquidator in Scotland had the preferable right, he might consider it of the greatest advantage not to make his claim until the local liquidators had effectually gathered in the assets.

However this might be, and admitting for the sake of argument that the local law in question conflicted with the general, still, the question remains as to whether the local, that is the Dominion Law, is not *ultra vires* of the Dominion Legislature. This I find to be an extremely delicate question, but one for which we may fairly conclude we have a precedent by the Supreme Court in the case of *The Commercial Bank of Halifax v. Gillespie, Moffatt & Co.*,¹ for although the point was not there necessarily in

¹ 10 Can. S. C. R. 312.

question, yet from the freely expressed opinions of at least two of the judges, one other not expressing any dissent on this point, we may conclude that the opinion of the majority of that Court was that the legislation in question subjecting foreign joint stock companies to the winding-up process of Canadian courts, was *ultra vires* of the Dominion Legislature, especially in that it conflicted with the Imperial legislation directing such companies incorporated under the English Statutes to be wound up in Great Britain. I think in the present condition of the jurisprudence we should hold it to be so.

As to the second question, I cannot doubt the capacity of the appellant to make the objection and raise the question. In the case of the *Commercial Bank of Halifax v. Gillespie, Moffatt & Co.*, it was raised by a creditor. Allen is not a creditor but a large shareholder, and there might be a surplus over paying the debts in which he would have an interest. He has an interest to invoke the English law and courts rather than the Canadian, if he judges them more efficient to collect debts and settle questions as to contributories and as to other rights of the parties. He has such an interest as entitles him to be a party to the proceedings and therefore entitled to demand that they should be set aside as illegal. It has been contended that the supplementary letters-patent obtained in the Province of Quebec might give the necessary jurisdiction there. I do not think so. These were only to give effect to the charter under the Imperial Statutes.

On the whole I think the judgment should be to reverse the decision of the Superior Court and to set aside the winding-up proceedings.

DORION, Ch. J., for the majority of the Court:—

The appellant who is a stockholder of *The Scottish Canadian Asbestos Company, Limited*, now insolvent, complains of a judgment by which the respondents were appointed liquidators of the company under the provisions of the Dominion Winding-up Act, ch. 129 of the Revised Statutes of Canada.

The objection urged by the appellant, both

here and in the Court below, is that the company was incorporated under the Imperial Companies Act, 1862-1886; that it is subject to the laws of the Imperial Parliament as regards its franchises, corporate capacity, and its liquidation; that the winding up Act of Canada does not apply to this Company, and that in so far as it purports to relate or apply to the liquidation of the company, it is *ultra vires* of the Parliament of the Dominion of Canada.

By the articles of association, the head office of the company was to be in Scotland, and it was provided that in case of dissolution, its affairs should be wound up in accordance with the provisions of the Imperial Companies' Act, 1862-1883; the principal business of the company was, however, to be carried on in Canada, and was, in fact, carried on in the Province of Quebec, and for that purpose the company obtained Letters Patent under Art. 4764 of the Revised Statutes of the Province of Quebec.

There is no doubt as to the insolvency of the company, which is in liquidation under proceedings now pending in Scotland.

The only question to be determined is whether the creditors of a company organized under the Companies' Act 1862-1886, of the Imperial Parliament, but doing business in the Province of Quebec, where it holds both real and personal property, can avail themselves of the provisions of the Winding-up Act, ch. 129 of the Revised Statutes of Canada, to realize the property of the company within the province of Quebec or within the Dominion, in order to secure the payment of their claims.

The provisions of the Winding-up Act of Canada are applicable: 1st, to insolvent companies. 2nd, to companies in liquidation or in process of being wound up.

They regulate the proceedings of our courts to enforce the rights of creditors and of shareholders on the property of such companies.

As they only relate to procedure, their operation is confined to property found within the territorial limits of the jurisdiction of the Courts authorized to enforce them. For the same reason, within such territorial limits, their operation can neither be re-

gulated nor restrained by any foreign legislation, Foelix, *Droit International Privé*, vol. 2, pp. 40, 41-42, Nos. 318, 319 and 320.

Story, *Conflict of Laws*, § 539, after citing the rule laid down by Boullenois, Pr. Gen. l. 2, pp. 2-3, that: "the laws of a Sovereign rightfully extend over persons who are domiciled within his territory, and over property which is there situated," adds:—"On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." *Idem*, § 549—§ 556. Having stated these general principles in relation to jurisdiction, (the result of which is, that no nation can rightfully claim to exercise it, except as to persons and property within its own domains,) etc., the same writer says: "It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted; or, as the civilians uniformly express it, according to *lex fori*."

The same legislative authority which can prescribe the mode in which sheriffs and other judicial officers may attach, sell and dispose of the real and personal property of a debtor to satisfy the claims of his creditors, may also, without exceeding its powers, direct that the seizure, sale and disposal of the property, in this country, of incorporated companies, may take place by other officers acting under the orders and directions of the Courts; and this is what has been done by the Winding-up Act, enacted by the Dominion Parliament.

But it is said that the Winding-up Act, besides providing for the sale and distribution of the property of insolvent companies, when found in this country, also provides that a list of contributories shall be settled, their rights established, and that the business of the company shall cease, and that all transfers of shares and alterations in the status of the members of the company, after the commencement of the winding up, shall be void.

From the principle already stated, that the laws of sovereignty only extend over per-

sons domiciled within the territory of the sovereign, and over property which is there situated, it is evident that the Dominion Parliament never intended to regulate, suspend, or dissolve by the Winding-up Act, any corporation existing under British or foreign authority, but merely to regulate their property and restrain their action in this country, which it undoubtedly had a right to do. The several legislative bodies in Canada can have no concern in what a foreign corporation may do elsewhere; they are only interested in protecting the rights of creditors of such corporation upon their property within this country, and more particularly the rights of their own citizens, and of resident creditors. There are in every statute enactments which do not apply to every case coming under its provisions; this does not destroy the effect of such enactments as are applicable to the particular case to be acted upon; and even if such enactments were *ultra vires*, the remainder of the Act would still remain in force, in so far as it is applicable to foreign corporations and their property in this country.

Our attention has been called, at the argument, to the case of *The Merchants' Bank of Halifax v. Gillespie, Moffatt & Co.*, 10 Supreme Court Rep., 312.

If I understand rightly the report given of that case, the only point raised by the parties and decided by the Court, was that the Winding-up Act, 45 Vict., ch. 23, Canada, did not apply to "*The Steel Company of Canada (Limited)*," incorporated in England under the Companies' Act, 1862-1867. This objection has been removed by the 47 Vict., ch. 39, which has declared that the Winding-up Act should apply to all incorporated companies doing business in Canada, no matter where incorporated. As this last Act was passed since the question was raised in the case of the Merchants' Bank of Halifax, there can now be no doubt as to the intention of Parliament to apply the Winding-up Act to foreign as well as to domestic incorporated companies. See also Revised Statutes, Canada, ch. 129, sect. 3, and sect. 108 § 5.

It is true, that two of the Honorable

Judges who sat in the case of the Merchants' Bank of Halifax, expressed doubts as to the authority of the Dominion Parliament to apply such a law to a company deriving its charter under an Imperial Statute, as this would be in conflict with the Imperial Act, 28 and 29 Vict., ch. 63.

It can hardly be contended that a declaration in the articles of association of a company incorporated in Great Britain, under the Imperial Companies Act, that the Company intend to carry on business in Canada, can have the effect of relieving the Company from the operation of Canadian laws as regards their property, and the dealings of such Company in Canada.

If this authority to carry on business in Canada had been conferred on the Company by a special Act of the Imperial Parliament, such enactment should be construed as permissive only, so as to enable the Company to do business elsewhere than in Great Britain, without forfeiture of its charter, and not as overriding the laws of Canada any more than the laws of any foreign country to which its operations might extend.

The Imperial Act 28 and 29 Vict., ch. 63, can only refer to such legislation by a colony as is inconsistent with the laws or statutes of the Imperial Parliament applying specifically to such colony.

The right not only of the Dominion Parliament, but also of the legislatures of the several Provinces of Canada, to legislate with regard to and impose conditions upon companies doing business in Canada, although incorporated under the provisions of the Imperial Statutes, was expressly recognised in the case of the *Queen Insurance Co. v. Parsons*, 4 Supreme Court Rep. 215, and L. R. 7 P. C. 96.

This very company, *The Scottish and Canadian Asbestos Co.*, had to obtain a license under 43-44 Vict., ch. 38, Quebec, before it could transact business in this country, and I am not aware that the authority to require such a license as well as licenses issued in the case of Insurance Companies, Rev. St., ch. 124, s. 4, has ever been questioned.

As to the rules of international law, which were invoked in the case of the Merchants'

Bank of Halifax, they may have been applicable to that case, which arose in Nova Scotia, but they are foreign to the principles of the French law, which prevail in this province; and it is by the rules and principles of the French law, and not according to those of any international law not recognized here, that this case must be decided.

Foelix, *Droit International Privé*, t. 2, No. 347:—"En France, la jurisprudence maintient rigoureusement, en cette matière, le principe de l'indépendance des Etats; elle refuse aux étrangers l'autorité de la chose jugée, ainsi que l'exécution sur les biens et sur la personne du débiteur qui se trouve en France."

Idem, t. 2, No. 368—2 al:—"Ainsi, la décision étrangère qui accorde à une maison de commerce également étrangère un sursis (*moratorium*) aux poursuites de ses créanciers, n'empêche pas qu'il soit pratiqué en France des *saisies-arrêts* au préjudice de cette même maison de commerce."

Idem, No. 368,—5e al. "L'étranger déclaré failli dans son pays n'est pas toujours réputé tel en France, et ses créanciers français peuvent néanmoins le faire assigner personnellement devant un tribunal de France."

"Le concordat consenti à l'étranger par les créanciers d'un failli étranger, et homologué par les juges de son pays, ne peut être opposé en France aux créanciers français qui refusent d'y adhérer."

Laurent, *Droit Civil International*, t. 7, p. 239, No. 179: "Des meubles situés en France et appartenant à un étranger sont saisis. Quelle loi suivra-t-on, le statut personnel de l'étranger ou le statut réel de la situation? Le statut réel, sans doute aucun, tout le monde est d'accord."

Idem, No. 181, pp. 242, 243 et 244—No. 210, pp. 264-5—No. 211, pp. 265, 6, 7—Foelix, *Droit International Privé*, t. 2—No. 368, p. 206.—"Ainsi, en France, le jugement étranger ne fera pas obstacle aux poursuites individuelles contre un failli déclaré tel par un tribunal de sa patrie."

Demangeat, in his notes, p. 209 of same work, says: "Il va sans difficulté qu'un tribunal français peut, suivant les cas, déclarer la faillite d'un commerçant étranger;

"c'est là une mesure conservatoire. Il y a plusieurs décisions en ce sens, etc."

Massé, Droit Commercial, t. 2, No. 809, p. 77.

Pardessus, Droit Commercial, No. 1488, bis. Merlin, Rep. Vo. Faillite & Banqueroute, sect. 2, par. 2, art. 10, *Idem*, Questions de droit, Vo. Jugement, § 14, and in fact all the French authors, without exception, are of opinion in accordance with the jurisprudence, that proceedings in insolvency in a foreign country, do not control either the movable or immovable property of the insolvent to be found in France, as against French creditors who are entitled to all the remedies secured by the French law against their debtors.

The Courts here, as in France, will recognize the proceedings of a foreign tribunal in matters of insolvency, to the extent of recognizing the capacity of assignees or trustees to represent the estate of bankrupts in this Province, when no adverse interest has been acquired in this country over such estate, otherwise they will only be allowed to claim property in the Province of Quebec, subject to all the equities and adverse rights of creditors and others, to be determined and settled according to our laws and not according to the laws of the country of the domicile of such insolvent. Article 1981, Civil Code.

It is contended here, that liquidators appointed in Scotland can alone dispose of the property in this country of the insolvent company, and that they have the right to remove the proceeds to Scotland in order to distribute such proceeds according to the laws of the domicile of the company. If this could be done the judgment which sanctioned their appointment would have conferred upon them greater powers than the insolvent company would have had. The company could never have removed or attempted to remove its property from this country, to the prejudice of the creditors here, without giving them the right to attach such property and prevent its being taken abroad (Art. 834, C. C. P.), and the contention that the assignees or liquidators, who are merely the legal administrators of the estate, could derive from a foreign judg-

ment more authority over the property of the insolvent company than the company had, cannot be entertained here.

Another difficulty arises about the real estate of the company in this Province. Are the Scotch liquidators seized of that property as well as of the personal estate, by virtue of their appointment in Scotland, and if not, how is that property to be dealt with, except under the orders and rulings of our own Courts, and through such officers as they may choose to appoint under the laws of this Province?

But supposing the liquidators in Scotland had all the authority which is claimed for them, it would seem that they alone could complain of the proceedings to appoint liquidators under the Winding-up Act in force in Canada. They do no such thing. They assent to the proceedings taken here, and look upon them as ancillary to their own proceedings, to arrive at a final winding up of the estate.

The appellant is a shareholder, and as such is a mere contributory, and it is difficult to understand what real interest he can have in having the distribution of the property in this country, made elsewhere than where the property and most of the creditors are, unless it be to deprive the latter of such rights and privileges as our law would afford them, which purpose ought not to be encouraged by the Courts here.

I therefore consider that both in law and in equity the respondent's pretensions are well founded, and the judgment of the Court below should be affirmed.

Judgment confirmed.

Charles Fitzpatrick, Q.C., and R. C. Smith for appellant.

Wm. White, Q.C., for respondents.

OBITUARY.

Mr. Edmund Lareau, M.P.P. for Rouville, died at his residence in Montreal, April 21. Mr. Lareau was born at St. Grégoire, in the county of Iberville, on the 12th March, 1848, was educated at the college of Ste. Marie de Monnoir, at Victoria college, of which he was an L.L.B., and at McGill, of which he was a B.C.L. He was called to the Bar in

1870. Mr. Lareau did considerable journalist work, and contributed also to periodical literature. He was the author of *Histoire du Droit Canadien* and other works. He first essayed to enter political life in 1882, when he was an unsuccessful candidate for Rouville for the House of Commons. In 1886, he was returned to the Provincial Legislature for the same county.

Mr. Mark Campbell, who died April 22, after a long illness, was one of the oldest and most respected officials of the Prothonotary's office, Montreal, where he served for forty-three years. He was noted for unfailing courtesy, and unremitting attention to the performance of his duties in the judgments department of the office. The bar will miss not only a familiar face but one who to very many of them was an old friend.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 19.

Judicial Abandonments.

Telephore Denis, carriage-maker, Montreal, April 9.
A. Gagnon & Co., Lévis, April 16.
Ludger Gamache, grocer, Quebec, April 16.
J. B. Lalumière, hotel-keeper, Montreal, April 10.
Pierre Martineau, contractor, Montreal, April 14.
Robert McNabb & Co., Montreal, April 14.
Amable D. Porcheron, trader, Coaticook, April 14.
Léandre Proulx, Sherbrooke, April 14.
Tancrede Robitaille, trader, St. Hyacinthe, April 9.

Curators appointed.

Re Alphonse Bertrand, St. Placide.—Bilodeau & Renaud, Montreal, joint curator, April 14.
Re Charles H. David, trader, Montreal.—S. C. Fatt, Montreal, curator, April 15.
Re Telephore Denis.—C. Desmarteau, Montreal, curator, April 16.
Re Isaac Dubord.—A. Quesnel, Arthabaskaville, curator, April 11.
Re Wm. Garlépy, contractor.—J. Frigon, Montreal, curator, April 9.
Re Francis Giroux, Montreal.—Kent & Turcotte, Montreal, joint curator, March 17.
Re Lamontagne & Frigon, contractors, Montreal.—D. Seath, Montreal, curator, April 15.
Re Louis Leveillé.—C. Desmarteau, Montreal, curator, April 14.
Re Malcolm MacCallum.—C. Desmarteau, Montreal, curator, April 14.
Re John O'Donnell, trader, North Ouslow.—Wm. Grier, Montreal, curator, April 15.
Re Owen Owens, New Rockland.—J. B. Stevenson, Montreal, curator, March 17.
Re Louis Pelchat, trader, St. Valier.—H. A. Bedard, Quebec, curator, April 12.

Dividends.

Re Philéas Faucher, St François Xavier de Brompton.—First dividend, payable May 5, J. A. Begin, Windsor Mills, curator.

Re Gagnon, frère & Cie.—First and final dividend, payable May 1, J. M. Marcotte, Montreal, curator.

Separation as to Property.

Héloïse Beauchamp vs. Pierre Martineau, contractor, Montreal, April 15.
Marie Bourbeau vs. Napoléon Boisclair, Nicolet, April 10.
Albina Desert vs. Zacharie Thérien, farmer and trader, St. Guillaume, April 10.
Cécile Fortin vs. Joseph Fortin, trader, St. Henri, May 29.
Marie Scholastique Asilda Martin dit Ladouceur vs. Félix Lévesque, joiner, Notre Dame de Grâce, April 2.
Emérance Mondoux vs. Elie Rochon, Ste. Cunégonde, Jan. 8.
Joséphine Poirier vs. Léon Citoleux dit Langevin, farmer, St. Timothée. Nov. 23, 1889.

Court Terms Altered.

Court of Queen's Bench, Rimouski, criminal term to begin March 22 and Oct. 23 of each year.
Superior Court, Rimouski, 16 to 21 of March and October, and 14 to 17 June and December.
Circuit Court, district of Rimouski, 10 to 15 March and October, and 10 to 13 June and December.
June criminal term, Queen's Bench, Percé, discontinued, and term to be held Oct. 21.

GENERAL NOTES.

PRIVILEGES OF FOREIGN AMBASSADORS.—The privileges of foreign ambassadors and legates and their servants in enjoying immunity from taxation, though established by the comity of international law as early as the reign of Queen Anne, appear to have been as gall and wormwood to the vestrymen of the parish of St. Marylebone. At all events, they have indulged in litigation with Sir Halliday Macartney, the secretary to the Chinese Legation, for the purpose of supporting their alleged right to levy rates on his house in Harley Street, which he had taken for the purpose of being near the Chinese legation in Portland Place. The vestry contended that as Sir Halliday is a subject of the Queen and has never renounced his allegiance, he could not claim diplomatic exemption, but must remain subject to the laws and burdens of the realm. But Mr. Justice Mathew decided that as he was employed as a servant of the Legation, and was unconditionally allowed by Her Majesty to be so employed, he is entitled to the same rights as other diplomatic personages.—*Law Journal*

MRS. BRADWELL'S CASE.—Twenty-one years ago Mrs. Bradwell, after pursuing legal studies, applied to the Supreme Court of Illinois for admission to the bar as an attorney at law. She presented proofs of study and certificates of proficiency, and a recommendation of admission from a circuit judge and a state's attorney. The justices of the Supreme Court gave the case a full consideration, but, as the law of married women stood in that state, at that time, felt compelled to deny the application on the ground of her disability as a married woman. She renewed her application, contending that the United States civil rights law covered the case. In a long opinion the justices a second time denied it, in 1870, suggesting, however, that the legislature might remove the disability. This was done in 1872, when a law was passed providing for the admission of all women to the Illinois bar on the same terms as men. Mrs. Bradwell, however, then declined to make a new application, and has since been engaged in editing the *Chicago Legal News*. In March last, upon the original record and brief, twenty-one years old, the justices of the Supreme Court paid the lady the compliment of a reversal of the former decision. Upon their own motion, and without any application, they directed a license as attorney and counsellor to be issued to Mrs. Myra Bradwell.

The Legal News.

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MAY 3, 1890.

No. 18

AN IMPORTANT WORK.

It may be a surprise to our readers to learn that the late Mr. Justice Mackay, of the Superior Court, had been engaged, for a number of years before his death, in the preparation of a work on the law of fire insurance. It is probable that a special study of this subject had been made by the learned judge before his appointment to the bench. At all events the materials which had been accumulated during a considerable time, were framed into something like a systematic treatise prior to his retirement from office, for in June, 1881, the learned judge communicated with the editor of this journal with reference to the preparation of the work for the press. The voluminous manuscript was examined and arranged, but the author was soon after compelled, by the state of his health, to retire from the bench, and was absent from Canada for some time. Little more was done until the close of 1884, when the work was again examined and revised, the arrangement was somewhat altered, some parts were curtailed, and notes of fresh cases were embodied in it. Publication, however, was deferred, the learned judge being desirous of further revising it, and his health not permitting continuous application. Notes and remarks were still being accumulated, when the task was interrupted by the illness and death of the lamented author.

It is the wish of the relatives of Mr. Justice Mackay that the work upon which so much time and thought were expended should not be lost to the profession. With this view the manuscript has been again placed in our hands, and it is proposed to publish portions of it from time to time in this journal. We are well aware from his own lips, that Judge Mackay's aim was not to write an ambitious work upon a subject which has been elaborately treated by English and American authors. What he chiefly desired was to supply the profession with a convenient

manual upon a branch of law of great practical importance. To this end he abridged from time to time and cancelled portions which he considered might be dispensed with, and he would probably have carried the process of excision still further had he lived to complete the revision. We shall have the less hesitation, therefore, in using a discretion to omit, at all events for the present, such paragraphs and notes as seem less material. An editor is always at some disadvantage in taking up an unfinished work. We have had the assistance, it is true, of numerous consultations with the author, but, nevertheless, we feel that some indulgence may be required in view of the circumstances in which the work sees the light.

LEGISLATION OF LAST SESSION.

The following Acts passed by the Quebec legislature during the last session amend articles of the Codes :—

53 V., CHAP. 55.

An Act to amend articles 67, 68 and 69 of the Code of Civil Procedure.

1. The following paragraph is added to article 67 of the Code of Civil Procedure.

"In the case of an action in separation from bed and board by a husband against his wife, if the latter resides outside the Province of Quebec, she may be called in to appear in virtue of article 68 or 69, as the case may be."

2. The words "but has property therein," in article 68 of the said Code, as contained in article 5866 of the Revised Statutes of the Province, are replaced by the following: "but that the cause of action arose therein."

3. The words: "when a defendant having property in the Province has never had or has no longer any domicile therein, or" in article 69 of the said Code, as contained in article 5867 of the said Revised Statutes, are repealed and replaced by the following: "if the defendant has left his domicile in the Province, or has never had such domicile, and"

4. This Act shall come into force on the day of its sanction. (April 2.)

53 V., CHAP. 58.

An Act to amend the Code of Civil Procedure, respecting proofs.

1. Article 238a of the Code of Civil Procedure, as contained in Article 5876 of the Revised Statutes of the Province of Quebec, is amended by striking out the words "Three Rivers," in the second paragraph thereof.

2. Article 243 of the said Code, as it is contained in article 5877 of the said Revised Statutes, is amended by striking out the words "Three Rivers," in the third clause of the said article.

3. This act shall come into force on the day of its sanction. (April 2.)

53 V., CHAP. 57.

An Act to amend the Code of Civil Procedure, so as to permit the taking of evidence by stenography in *ex parte* cases.

1. Article 317 of the Code of Civil Procedure is amended by adding thereto the following: "and the evidence may be taken by stenography, in conformity with articles 320a and 320b, as added by article 5888 of the Revised Statutes of the Province of Quebec. (April 2.)"

53 V., CHAP. 58.

An Act to amend article 556 of the Civil Procedure, respecting the seizure of moveables, as contained in article 5917 of the Revised Statutes of the Province of Quebec and amended by the Act 52 Vict., chap. 50.

1. Paragraph 6 of article 556 of the Code of Civil Procedure, as contained in article 5917 of the Revised Statutes of the Province of Quebec is replaced by the following:

"6. One sewing machine."

2. Paragraph 8 of the said article, as replaced by the Act 52 Victoria, chapter 50, section 8, is replaced by the following:

"2. One span of plough horses or a yoke of oxen, one horse, one summer vehicle and one winter vehicle, and the harness used by a carter or driver for earning his livelihood, one cow, two pigs, four sheep, the wool from such sheep, the cloth manufactured from such wool, and the hay and other fodder in-

tended for feeding the said animals; further, the following agricultural tools and implements: one plough, one harrow, one working sleigh, one tumbril, one hay-cart with its wheels, and all harness necessary and intended for farming purposes."

53 V., CHAP. 59.

An Act to amend articles 621, 624 and 631 of the Code of Civil Procedure, respecting seizures after judgment.

Whereas it is expedient to amend articles 621, 624 and 631 of the Code of Civil Procedure, concerning attachment after judgment; Therefore, etc.

1. The first paragraph of article 621 of the Code of Civil Procedure is amended so as to read as follows:

"If the declaration of the garnishee is not contested, and he has not declared that any other seizure has been made in his hands, the court upon an inscription for judgment, by either party, orders him to pay to the seizing party, on account or to the extent of his debt, the moneys seized, according to their sufficiency."

2. Article 624 of the said Code is amended by adding the following after the first paragraph thereof:

"If the seizing party fails to proceed against such garnishee, the party seized may obtain the dismissal of the seizure, with costs against him; or he may inscribe the case for judgment by default against the garnishee, and execute it in the name of the seizing creditor."

3. Article 631 of the said Code is amended so as to read as follows:

"631. If a garnishee declares that he is not indebted and he cannot be proved to be so, the court, on motion of the garnishee or of the party seized upon, orders him to be discharged from the seizure, and condemns the seizing party to pay the costs."

53 V., CHAP. 60.

An Act to amend the Code of Civil Procedure, with respect to abandonment of property.

1. Article 772a of the Code of Civil Proce-

ture, as added by article 5961 of the Revised Statutes of the Province of Quebec, is replaced by the following:

"772a. The moneys realized by the curator from the property of the debtor must be distributed amongst the creditors by means of dividend sheets prepared after the expiration of the delays to file creditors' claims.

Such dividend sheets are payable fifteen days after a notice of their preparation has been given and a copy of such sheets has been sent to each creditor.

Such notice is given by the insertion of an advertisement in the Quebec Official Gazette.

Such copy of the dividend sheets, together with such notice, is sent by mail, by registered letter, to the address of each of the creditors of the debtor who have filed their claims, or who appear upon the list of creditors of the debtor.

The claims or dividends may be contested by any party interested.

The contestation for such purpose is filed with the curator who is bound to transmit it immediately to the prothonotary of the Superior Court of the district in which the proceedings upon the abandonment are then deposited, or in such other district as the parties interested in the contestation may agree upon; and such contestation is proceeded upon and decided in a summary manner."

53 V., CHAP. 61.

An Act to amend the Code of Civil Procedure, respecting summary matters.

1. Paragraph 3 of article 887 of the Code of Civil Procedure, as it is contained in article 5977 of the Revised Statutes of the Province of Quebec, is amended by adding thereto the following: "suits by farmers for the price of their farm produce, suits by advocates, notaries and physicians to recover the sums due to them for professional services, suits by printers for printing, publications or work performed by them in that capacity, as well as those for the price and value of subscriptions to journals or newspapers."

2. Article 897a of the said Code, as added by the Act 52 Victoria, chapter 52, section 1,

is amended by adding after the word "shall," in the ninth line, the words "in contested causes."

3. Article 899a of the said Code, as added by the said article 5977 of the said Revised Statutes, is amended by adding the following paragraph;

"The words 'summary matters,' shall be written or printed at the end of each original and copy of writ issued under the provisions of this chapter, which provisions shall be interpreted so as not to take away the option of proceeding under the ordinary rules of procedure."

MAGISTRATE'S COURT.

53 V., CHAP. 52.

An Act respecting certain proceedings had before the Montreal District Magistrate's Court and the execution of the judgments of the said court.

1. All proceedings had and commenced in suits for fifty dollars and over, before the Montreal District Magistrate's Court, in virtue of the Acts 51-52 Victoria, chapter 20 and 52 Victoria, chapter 30, shall be continued before the Circuit Court of Montreal.

The judgments rendered by the said magistrate's court in suits for the same amount shall be executed by the said Circuit Court.

2. The proceedings had and commenced in suits under fifty dollars before the said District Magistrate's Court shall be continued, and the judgments for the same amounts shall be executed, by the Magistrate's Court for the city of Montreal.

3. According to law, the records, registers, documents and archives of the Magistrate's Court of the District of Montreal, in cases for the amount mentioned in the first section of this Act, shall be transferred to the office of the Circuit Court, in the district of Montreal, and those in cases for the amount mentioned in the second section shall be transferred to the office of the Magistrate's Court of the city of Montreal.

4. This Act shall come into force on the day of its sanction. (April 2.)

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER I.

OF THE CONTRACT OF INSURANCE, HOW MADE,
WHEN PERFECTED, AND OF THE APPLICATION.§ 1. *Definitions of fire insurance.*

Fire insurance is a contract by which one person takes upon himself the risk of fire to which a thing is exposed, and obliges himself towards another, to indemnify him for any loss he may suffer by fire, if fire destroy or damage the thing insured, and this in consideration of a sum of money, price of the risk run.

The Civil Code of Quebec, Article 2468, says: "Insurance is a contract whereby one party, called the insurer or underwriter, undertakes for a valuable consideration, to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event."

Art. 2569 of the same Code, says: "A fire policy contains the name of the party in whose favor it is made;—a description or sufficient designation of the object of the insurance and of the nature of the interest of the insured; a declaration of the amount covered by the insurance, of the amount or rate of the premium, and of the nature, commencement and duration of the risk;—the subscription of the insurer with its date;—such other announcements and conditions as the parties may lawfully agree upon."

It may be defined in other words as a contract of indemnity, by which one person in consideration of a sum of money, undertakes, usually, to guarantee another, to the amount of the sum insured, against any loss or damage which he may, during a time fixed, sustain by fire damaging the property described.¹

¹ The best definition of the contract is said to be given in 2 Bl. Comm: 458:—"A policy of insurance is a contract between A and B, that upon A paying a premium accepted as equivalent to the risk, B will indemnify against a particular event."

In 1880, in the Court of Appeal in England, the Lord

§ 2. *Partial loss and average.*

The insurers may stipulate not to be liable for partial loss, and some policies are made subject to condition of average, so that if at the time of a fire the value of the objects insured exceed the sum total of the insurance, the insured is considered his own insurer for the excess.

Conditions of average make the liability of the insurer relative only for an amount in the proportion that the sum insured bears to the value of the property at risk. The insured is considered as himself insuring for the proportion of the value of the property which exceeds the amount of the insurance, and therefore liable to contribute in that proportion in case of loss. (Bunyon.)

§ 3. *Nature of the contract.*

The contract of insurance is consensual, and synallagmatic or bilateral. If payment of the premium be admitted in the policy the contract is unilateral, says *Le Dictionnaire des assurances terrestres*, 588. But though the premium be paid there are such obligations on the assured that the contract viewed in its entirety must be held conditional, and bilateral. Policies in France are generally for a term of years, for annual or semi-annual premiums promised, and with fifteen days of grace to pay each instalment of premium, and all premiums are *portables*. The policies are synallagmatic contracts, and must be made in duplicate, signed by both parties (Art. 1325, Code Napoléon).

In Quebec, policies in duplicate are not usual nor required, and as to signatures our Code (2569) points only to signature by the insurer.

§ 4. *The parties, and the premium.*

The person who charges himself with the risk is the insurer; the other is the insured; the sum paid or agreed to be paid, as the price of the risk, is called the premium, and the act or writing made to evidence the contract, the policy.

Justices, in *Darrell v. Tibbitts*, held the contract of Fire Insurance a contract for indemnity, and a contract of the same kind as from a marine policy—the insured can't get paid twice over. 5 Q. B. Div. 560.

The contract is not to pay a certain sum on a particular event like in life assurance. *North Br. Ins. Co. v. London, Liverpool & Globe*, 5 Ch. Div. 568, cited.

§ 5. *By whom the business is carried on.*

In Quebec Province the business of fire insurance is almost entirely carried on by companies, most often incorporated, but there seems to be nothing to prevent any private individual from carrying on such business.

§ 6. *When commercial.*

Fire insurance is not by nature commercial, but if carried on by mercantile men, or by traffickers in it alone, and as carried on by incorporated insurance companies, it is so, except as regards mutual insurance. Art. 2470, C. C. L. C.

Carrying on the business of ordinary fire insurance is considered trading in the Province of Quebec. Even minors, if traders, as they sometimes are, can carry on the business there. Art. 2470, C. C.

§ 7. *Organization of insurance companies.*

In most countries there are statutes establishing rules for the formation of corporations or companies for insuring, and for the visitation and examination of them; and for controlling and winding them up, if need be. Local Legislatures may make laws regulating forms for policies of insurance and conditions of them,—*Ulrich v. Nat. Ins. Co.*, 4 Ont. Appeal R. 84.

§ 8. *Deposit required for doing business in Canada.*

Fire insurance companies must make a deposit and obtain a license in order to do business in Canada. R.S.C. ch. 124.

§ 9. *Mutual companies and contribution companies.*

In almost all countries there are, also, mutual fire insurance companies, and contribution companies. Of these we do not intend to treat particularly. Suffice it to say, as to the former, that they are generally the creatures of local statutes, which order the modes of their formation, their organization, and the extent of liability of their members. Each person whose property is insured in such companies becomes a corporator, or member, bound by its by-laws, and liable to pay a proportion of all losses. The insured are insurers at the same time. Generally the members of such companies must be

freeholders. In the Province of Quebec one company only is allowed in one county.

Our remarks in the present work will be with reference to ordinary fire insurance companies, or *assurances à prime*.

§ 10. *How the contract may be made, and how proved.*

Mere consent can make a contract of insurance, but writings are required in matters over \$50, and parol evidence is only admissible to complete the proof where a *commencement de preuve par écrit* is seen. So, a parol agreement to renew a policy cannot be proved without a writing or *commencement de preuve*. Mere parol proof of fire insurance is no more admitted than mere parol proof of sale of lands; and in practice parol insurances are very infrequent.

§ 11. *Contract made by writing or parol.*

Under the French Code de Commerce, Art. 332, the contract of insurance is made in writing. Yet even for amounts above 150 francs, if there be a commencement of proof in writing, it may be proved by parol. So it was held by old writers. Emerigon disapproved of the doctrine, but in modern France it is held so against Emerigon.¹

The Cour de Cassation, in a case decided 13th July, 1874, held that insurance, in cases over 150 francs, must be proved by writing, or there must be a commencement of proof in writing, in order to admit parol testimony. Under 150 francs the contract may be proved by witnesses, under the common law.²

§ 12. *Insurance in the Province of Quebec may be verbal.*

In the Province of Quebec there is no absolute need of a policy, nor is a writing absolutely necessary for the validity of the contract, unless required by the law incorporating the company insuring. In the absence of such a law this contract, like many others usually made by writing, may

¹ 4 Massé, Dr. Comm. 2566

² See Journal du Palais for 1863; Cour de Cassation, 5th November, 1862.

All contracts of insurance must be printed or written says Smith on Contracts, p. 136. Flanders treats of parol contracts to insure (p. 133), and says they are enforceable.

be verbal. Insurance, as being a commercial matter, was in old France cognizable in the Tribunals of the *Juge et Consuls*, and these Tribunals admitted proof by parol generally even of contracts involving over a hundred livres, except where prohibited. The Ordonnance de la Marine ordered policies, yet this was held to be only towards proof of the contract. Even under that Ordinance other modes of proof competed to an insured;—for instance, the oath to the alleged insurer. Such is the opinion of Pothier and Merlin; Emerigon differs from them.

In Quebec, where the Ordonnance de la Marine was never enregistered, and where the modern French law does not control, proof of the contract may be made by policy, by other writing, by oath to the insurer, and by parol, unless where the law incorporating a company orders otherwise.

In Quebec, though an Act incorporating an insurance company say how its policies shall be made, and confer affirmatively power to contract by policy, but be, as regards other modes of insuring, silent, such company would be held bound by a contract by parol made by any authorized agent, if evidence were furnished that it had assumed power to make contracts so, was in the habit of making them so, by parol, and did make the one in question. From the language of the judges in the Privy Council in *Montreal Assurance Co. v. McGillivray*,¹ it would seem that the same principle might be admitted to govern even in England, though it is generally supposed that there the rule that a corporation cannot express its will but by writing under seal (except as to insignificant acts) has not been relaxed as in the United States and Quebec.²

An insurance company, authorized to contract in a particular mode under a statute

declaring simply that contracts signed in a given way shall be binding, may nevertheless contract under its corporate seal, or in any other form which the law will allow, the statute in such case being directory only.¹

If a statute incorporate a company to insure, but only by policy, the company must obey the statute, and an insurance by parol by it will not bind it. But even under such statute payment of premium to such a company and agreeing by writing for a policy to be delivered afterwards, after such a delay only as the necessities of business in the company's office make unavoidable, I think would operate an insurance, though a loss should happen before delivery of any policy. It would in the Province of Quebec, and it seems that it would in England provided the written agreement were stamped.² The language of all such statutes must be weighed; words permitting or authorizing action by policy do not necessarily involve prohibition to act by other modes. In the Province of Quebec, were a company, incorporated under an Act, not expressly limiting it to contract only by policy, to sue an insured upon his note given for premiums earned on insurance by parol, the insured would in vain plead freedom from obligation upon the pretence that no risk had ever attached upon such insurances.

[To be continued.]

FRENCH COUNCILS OF PRUD'HOMMES.

A short report just furnished by the British Embassy to the Foreign Office, and prepared by Mr. De Bunsen, on the Councils of Prud'hombres, which are established in all the important centres of population in France, possesses a special interest both for the insight furnished into the practical working of institutions among our neighbours and for the bearing which it may have on certain tendencies and influences at work among ourselves. We have been long ac-

¹ 19 L. C. R. 488.

² *Semble*, the Province of Quebec is bound by the Privy Council decision. If it say parol contract cannot be made in this province it must be so held.

In Ontario, the judges hold as they say the Privy Council held: no fire insurance contract can be made but by writing.

Suretyship—can it be by parol? Yes, insurance can or could be, but for the enactment of Stamp Acts in England. No insurance is available there unless the policy be stamped.

¹ *Safford v. Wickoff*, 4 Hill's N.Y. Rep., and observations per the Chief Justice in *Montreal Assurance Co. v. McGillivray*, 2 L. C. J. 244.

² See observations of Judges of Privy Council in *Montreal Assurance Co. v. McGillivray*, 9 L. C. R. 488

customed to the 'domestic forum' of arbitration, and the official referees constitute to a certain extent a departure from our regular legal system. The administration of the law under complicated Acts of Parliament has in the case of the railway commission been partly entrusted to laymen specially conversant with the interests involved. But, with these exceptions, the settlement of disputed rights and the adjustment of contractual and other relations between man and man, have with us been exclusively assigned to the legal profession. Extra-judicial bodies have, it is true, of late years grown up among us, such as chambers of commerce and boards of conciliation for the settlement of strikes and locks-out. But these are purely voluntary in their character, and have no legal status or authority. Bodies of this kind, however, as their practical influence extends, are not unlikely in the future to claim statutory powers of a judicial or quasi-judicial character. And in the bill recently mentioned in these columns, which Sir Albert Rollit has introduced this session, it is proposed to establish commercial tribunals in which the lay element will be largely represented.

In France the non-professional administration of justice in certain classes of cases has been established since 1806. The Councils of Prud'hommes are described to be local boards elected for the settlement of disputes between masters and workmen. The whole system is indicative of a much simpler and more patriarchal state of society than that in which we live, and the jurisdiction exercised is much less important than that with which Sir A. Rollit seeks to invest his tribunals. The questions dealt with by the councils are wages, contracts, deductions made from wages in consequence of misconduct, absence from work, apprenticeship, valuation, piecework, and, generally, the differences which arise in the relations of employer and employed. The burning question of strikes, however, which in this country has been made the occasion of the appointment of extra-judicial bodies, is excluded from the purview of these councils, and no matters, such as the rate of wages, of a sumptuary or quasi-sumptuary character are submitted to them for decision. The first council was

constituted for the district of Lyons, and the functions of the Prud'hommes have been successively enlarged and revised by a series of enactments, the most important of which are the decree of May 27, 1848, and the laws of June 1, 1853, and February 7, 1880.

Each council is created at the request of the local chambers of commerce by a Government decree, which must specify exactly how many Prud'hommes are to form the council, six being the minimum, excluding the president and vice-president, over how many communes this authority is to prevail, and what industries are to be subject to it. Thus the jurisdiction is strictly limited in each case. Mines and railways are not included, nor are the relations of shopkeepers, merchants, and clerks. The councils are, in fact, *par excellence*, the artisans' tribunal. Efforts, however, are being made to bring all industries within the jurisdiction. The members are elected and the franchise is bestowed on a basis which is calculated to ensure intelligence and character in the voters. It is confined to masters and workmen belonging to the specified trade, who are over twenty-five years of age and have resided at least three years in the locality. A Prud'homme must be thirty years of age and able to read and write. These conditions seem to indicate that the French urban population is much less migratory than our own, and we imagine could hardly be fulfilled in London and the other large cities of this country. Masters and men are equally represented in the council. Before 1880 the president and vice-president were appointed by the State, and could only be employers; but now the Prud'hommes elect these officers for the year out of their own numbers; and if the president be a master, the vice-president must be a workman, and *vice versa*. The Prud'hommes are usually, but not necessarily, paid a salary at the expense of the district over which their jurisdiction extends. Half of the body retire every three years, but the retiring members are re-eligible. It is, one would imagine, an object of ambition for an intelligent workman to obtain election to the council, which it is to be hoped affords scope for energies which might otherwise be devoted,

as is too frequently the case in this country, to agitation and mob oratory.

Every council is divided into two main 'bureaux' or sections: the 'bureau particulier' or 'de conciliation,' consisting only of one man and one master, and the 'bureau général' or 'de jugement.' The former, which generally meets once a week, endeavours to settle disputes off hand. If in this way no voluntary agreement can be reached, the case goes to the 'bureau général' for a regular trial, at which witnesses can be examined and judgment is delivered. This bureau is obliged by law to meet at least twice a month, and consists of the president and vice-president and four other members—masters and workmen being again equally represented.

Every Council settles for itself the order which its members are to serve on the two bureaux. The Prud'hommes are practical men with a knowledge of the industries over which they exercise jurisdiction. They are bound by no code or rules of procedure, and no lawyers are employed, and very few cases occupy more than one sitting. They are also invested with power to punish summarily up to three days' imprisonment any disturbance of order or infraction of discipline in workshop or factory. They have also police functions, which, however, are rarely exercised; and may inspect premises and report to the regular tribunals serious breaches of law, such as the disclosure of trade secrets or the theft of materials.

There are 136 of these councils, which dispose of about 42,000 cases in the year. Of these 20,000 were in Paris alone. About 16,000 are amicably settled, about 12,000 voluntarily withdrawn, and only 13,000 or 14,000 referred to the 'bureaux généraux' for judgment. In Paris, the total cost to the municipality is rather more than £8,000 a year, of which £4,992, or £48 each, goes to the 104 Prud'hommes. The summary jurisdiction, from which there is no appeal, extends to cases involving £8 and under; over that amount an appeal lies to the Chamber of Commerce. But M. Lockroy has a bill, now before a committee of the Chamber of Deputies, extending this jurisdiction to £20, and also modifying the franchise for the

election of Prud'hommes. It has not been thought possible to make the council arbiters in strikes, but M. Lockroy is submitting a bill which provides for the constitution of Boards of Arbitration on the English model. M. De Bunsen's report states that great services have been rendered by these bodies; but he also mentions that there is a widely spread fear that the proposed enlargement of functions and extension of the suffrage may lead to political and social dangers. In the large towns, indeed, wirepullers already to a considerable extent control the elections. The whole system is a striking illustration of the democratic character of French society, and arises out of conditions which have never existed in this country. The institution can hardly, therefore, serve as a model for our imitation. It is one thing for a system to have been established under comparatively simple conditions of society; it is quite another to introduce it into so complicated an organisation as our own, with habits and traditions so different from those which prevail in the country of its origin.—*Law Journal (London).*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 25.

Judicial Abandonments.

Charles S. Aspinall, manufacturer, Montreal, April 17.

Ephrem Eusèbe Bouchard, Waterloo, April 17.

Wm. Bouchard, trader, Chicoutimi, April 19.

Joseph Philias Perrault, trader, St. Anne de la Pérade, April 24.

Curators appointed.

Re Etienne Beauchemin.—Charles Milot, St. Monique, curator, April 16.

Re Joseph Desaulniers, Shawenegan.—F. Valentine, Three Rivers, curator, April 23.

Re J. S. Murphy.—John Y. Welch, Quebec, curator, April 9.

Re Camille Lalonde, St. Téléphore.—Kent & Turcotte, Montreal, joint curator, April 22.

Re J. B. Lalumière.—C. Desmarteau, Montreal, curator, April 17.

Re Pierre Martineau.—C. Desmarteau, Montreal, curator, April 23.

Re Robert McNabb & Co.—W. A. Caldwell, Montreal, curator, March 15.

Re J. S. Murphy & Co.—John Y. Welch, Quebec, curator, April 9.

Re J. A. Quintal.—C. Desmarteau, Montreal, curator, April 22.

Re W. H. Wilson.—J. Y. Welch, Quebec, curator, April 9.

The Legal News.

VOL. XIII. MAY 10, 1890. No. 19.

In the section of Mr. Justice Mackay's work published this week, treating of the interest of the insured, the author touches upon the much controverted question recently decided in *National Ass. Co. of Ireland & Harris*, M. L. R., 5 Q. B. 345, and referred to *ante*, p. 89. The earlier case of *Black & National Insurance Co.*, 3 Leg. News, 29; 24 L. C. J. 65, was one in which Mr. Justice Mackay's opinion was overruled by the Court of Appeal. As this question cannot be considered finally settled until a higher Court shall have passed upon it, we have allowed the section to stand as it was written.

A resolution moved by Mr. Blake on the 29th April last, and which was unanimously agreed to by the House of Commons, makes an important suggestion on the subject of disallowance of provincial Acts. The resolution was in the following terms:—"That it is expedient to provide means whereby, on solemn occasions touching the exercise of the power of disallowance, or of the appellate power as to educational legislation, important questions of law or fact may be referred by the Executive to a high judicial tribunal for hearing and consideration, in such mode that the authorities and parties interested may be represented, and that a reasoned opinion may be obtained for the information of the Executive." The judicial opinion is not to be binding upon the Executive, nor to relieve it of responsibility to Parliament, but is intended only for the information of the Government. The resolution was accepted by the Ministerial side, and a measure will at some future time be submitted to Parliament in accordance with it.

CIRCUIT COURT.

MONTREAL, April 8, 1890.

Before WURTELE, J.

THE WILLIAMS MANUFACTURING COMPANY
v.
WILLOCK.

Lessor and lessee—Privilege of lessor—Pledge—Article 1619, C. C.

- HELD:—1. *That the privilege of the lessor subsists so long as there has been no displacement of the moveable effects subject to it, or no removal of them out of his possession, and for eight days after such displacement or removal. It subsists on effects which the lessor, with the consent of an outgoing tenant, takes into his own possession as security for the amount due for rent.*
2. *A person in possession, ostensibly as owner, of a thing may validly give it in pawn, when the pledgee receives it in good faith, believing it to belong to his debtor.*

WURTELE, J.—The plaintiff seeks to revendicate a sewing machine from the defendant, alleging that it belongs to the company and that the defendant unlawfully retains it.

The defendant does not deny the plaintiff's ownership, but alleges that he had leased a parlor and a bedroom in his house on Bleury street to one William Hodgson, that Hodgson left the rooms on the 1st of May last, owing him \$7.50 for arrears of rent, that the sewing machine was brought into, and was kept in, the rooms by Hodgson during his occupation, that it was affected by the lessor's privilege, and was given to him by Hodgson, when he left, as security for the balance of rent then due, and that he was willing to surrender it on the payment of such balance.

It appears that the sewing machine belonged to the plaintiff and had only been leased to Hodgson.

The plaintiff contends that the defendant lost the lessor's privilege upon the sewing machine by having taken it into his possession without judicial process, and that he had no right to take and hold it in pawn as it belonged to the plaintiff and had only been leased to Hodgson.

The defendant denies these pretensions and maintains that he still has his lien as a

landlord, and that at all events the sewing machine was pawned for his claim and can be lawfully retained by him.

The plaintiff says that the defendant had no right to take the law into his own hands and detain the sewing machine by exercising restraint.

As to the principle invoked by the plaintiff, there can be no doubt. A landlord has no right to retain, without judicial process, and by force, the effects of an outgoing tenant; but this did not take place in the present case. Here the defendant did not use any force or exercise any restraint. Hodgson, of his own accord, agreed to leave the sewing machine in the defendant's possession, to secure the payment of the balance which he owed him. When Hodgson gave up and left the rooms the sewing machine was affected by the lessor's privilege for the balance then due of the rent. The plaintiff admits this, and also that it would have existed for eight days more, and could have been preserved by means of an attachment in recaption made during that period.

The landlord's privilege is founded upon articles 1619 and 1623 of the Civil Code, which enact that he has for the payment of his rent a privileged right upon the moveable effects which are found upon the property leased, and that he may seize them upon the premises or within eight days after they are taken away. The theory upon which this privilege is founded, is that the moveable effects placed by the tenant in the premises leased are pledged by him for the payment of the rent, and that being on the landlord's property they are constructively in his possession, although in the physical possession of the tenant. Baudry-Lacantinerie (vol. 3, p. 629), says: "En tant que le 'privilege porte sur les meubles garnissant la maison louée, il a pour cause une constitution tacite de gage. On peut facilement 'supposer, en effet, entre le bailleur et le 'preneur, l'existence d'une convention tacite, 'par suite de laquelle le mobilier mis par 'le preneur dans la maison louée, a été 'affecté à titre de gage au bailleur pour 'garantir le paiement des loyers." In the case of an ordinary pledge, the privilege subsists only so long as the thing pawned

remains in the hands of the creditor, and in the case of the tacit pledge which results from the lease of property, the privilege subsists as long as the moveable effects which are affected by it remain on the premises, or in the possession of the landlord; but in the latter case, by a special provision of law, to be found in Art. 1623 of the Civil Code, and in Art. 873 of the Code of Civil Procedure, the privilege is extended for eight days after the moveable effects have been removed. The landlord's privilege subsists as long as there has been no displacement of the moveable effects subject to it or no removal of them out of his possession, and for eight days after such displacement or removal, at the end of which delay it expires whether the things subject to it are in the tenant's possession or in the possession of a third party. Pothier, in his treatise on the Custom of Orleans, in No. 49 of the introduction to the title of Executions, says: "Après ce 'temps expiré l'hypothèque que le locateur 'avait sur les effets déplacés, s'évanouit, soit 'qu'ils soient en la possession de tiers, soit 'qu'ils soient encore en celle du locataire, 'son débiteur."

The condition necessary for the existence of the privilege and for its continuance beyond eight days, is possession by the landlord of the things affected by it as pledgee. Laurent, (Vol. 29, No. 383), says: "La possession est de l'essence du privilège 'attaché au gage; le créancier le perd dès 'qu'il cesse de posséder. Ce qui est vrai du 'gage conventionnel l'est aussi du gage tacite 'en vertu duquel le bailleur a un privilège." And in order to preserve his privilege a landlord has the right to prevent the removal of the things affected by it. Pothier, in his treatise on contract of lease, No. 252, says: "Le seigneur d'hôtel a comme en nantissement les meubles qui sont dans sa maison, 'd'où le locataire ne peut les faire sortir à 'son prejudice." There is no law to prevent an out-going tenant voluntarily leaving either all or some of his effects in the possession of his landlord to secure the payment of the amount which he may owe for rent; but in case he should attempt to remove his effects before paying all rent due, the landlord can only prevent him from doing so by means of

an attachment under Article 873 of the Code of Civil Procedure. In both cases the landlord retains his privilege; in the first case by retaining possession of the things subject to it, the constructive possession being changed to physical possession, and in the other case by exercising his rights during the existence of the privilege.

But in the present case, the defendant contends that, if he has lost the lessor's privilege, he has, at all events, the privilege and right of retention of a pledgee on the sewing machine, and the plaintiff maintains that, as the sewing machine was its property and only leased to the defendant, the latter could not validly give it in pawn.

Formerly a thing could not be given in pledge to the detriment of the owner, who could always recover it from the pledgee, although it was valid as between the pledgor and the pledgee. See Pothier, Nantissement, No. 7. But in 1879 the principles contained in Articles 1488, 1489 and 2268 of the Civil Code with respect to the sale of corporeal moveables were applied to the contract of pledge; and the law then enacted is now to be found in Article 1966a of the Civil Code. Since 1879, therefore, a person in possession, ostensibly as owner, of a thing, may validly give it in pawn, when the pawnee receives it in good faith, that is, believing it to belong to his debtor. The rules of the modern civil law in this respect apply here as in France. Aubry and Rau (vol. 4, p. 700), thus shortly lay down the law: "Il faut, pour pouvoir donner un objet en gage, en être propriétaire et avoir la capacité d'en disposer. Toute fois le créancier qui, de bonne foi, a reçu du débiteur un objet dont celui-ci n'était pas propriétaire peut, hors les cas de vol ou de perte, en refuser l'extradition au véritable propriétaire." And Laurent (vol. 28, No. 440), gives the reason for this: "Il peut paraître singulier qu'un simple droit réel l'emporte sur le droit absolu de propriété; la raison en est qu'il y a un intérêt général en cause, l'intérêt du commerce et de la libre circulation des choses mobilières." In the present case the defendant received in good faith from his debtor the sewing machine which belonged to the plaintiff, and he has the right to retain it until he is paid.

On the whole, I hold that the defendant's privilege as landlord still subsists on the sewing machine, and that, even if it has expired, he has a right of pledge upon it, and that he has the right to retain it until payment of his claim.

The Court, therefore, maintains the defendant's exception, with costs, and orders that upon payment to him by the plaintiff of the sum of \$7.50 due to him by Wm. Hodgson for arrears of rent and of his costs in this suit, he do deliver the sewing machine to the plaintiff.

Archibald & Foster, for plaintiff.

Hutchinson & Oughtred, for defendant.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER I.

OF THE CONTRACT OF INSURANCE, HOW MADE, WHEN PERFECTED, AND OF THE APPLICATION.

[Continued from p. 142.]

§ 13. Interest of the insured.

There must be a subsisting interest at the time of the loss, or the insured cannot recover. If the party insured sustain no loss he can seek no indemnity. But, in the absence of a clause prohibiting alienation of subject, a transfer by the insured of a share in the property insured will not vacate the insurance totally; and so if three or four coproprietors, or joint owners, insure, and two or three of them convey their shares to the other, or to a stranger, the insurance will not be totally vacated, but partially only. Considering that the policy in *Howard et al. v. Albany Ins. Co.*,¹ though prohibiting assignment of policy, was silent as to alienation of the subject insured, and had no clause in it providing for its becoming void in case of alienation of the subject, I think the judgment was wrong in holding that assignment by one of two tenants in common to the other was a bar to a joint action by both. But though joint action by both was repelled, was it said by the Court that no action could be brought by one of the original in-

¹ 3 Denio.

sured for his share? The plaintiffs declared in two counts: The first alleged interest in both plaintiffs at time of insurance and of fire. The second alleged interest in one only. Joint action by both would be repelled in Quebec, one of the nominal plaintiffs being without interest; but judgment in such an action would yet go in favor of the original insured who had never alienated. He would get judgment *pro rata*. Angell, § 198, disapproves the above judgment. His note 3 to § 198, I disapprove. I think that *Cockerill v. Cinc. M. F. Co.*, referred to by him, was rightly decided.

The American *Etna* policy condition (No. 2), literally would apply even to moveables, and to prevent changing of furniture, yet the jurisprudence is against the doctrine that the insured cannot change the furniture of his house.

Under such a clause as in the American policy, *supra*, where two persons hold property jointly and insure, and one conveys to the other, the policy is avoided *in toto*, so I hold. Yet, Angell, § 198, says: "only for the share conveyed." I would only agree with Angell in such a case as this: four insure, each for £100, a house owned by them jointly. In this case the insurance might be held though by one policy.

A trustee insures as trustee. He goes out of the trust and another is named, and after a fire, claims. In this case it was held that title to the property was not changed, and the action was maintained.¹ So, it would seem, if one tutor insure, and another succeed him; the latter shall recover after a loss, though there be a condition against change of property or possession by legal process, &c. Yet, suppose A to insure a house of which he is usufructuary; afterwards he becomes proprietor; afterwards fire destroys the house. In France A could recover nothing, for his quality had changed.

When the property insured has been sold and delivered or otherwise disposed of, "so that all interest or liability on the part of the assured has ceased."²

¹ *Savage v. Howard Ins. Co.*, 7 Alb. Law Journal, 140.

² This is part of one clause in policies of the Royal Insurance Company.

Insurance was effected for \$4,000. The insured sold the property insured for \$1,000 cash, and a mortgage was given back for \$7,000. A fire happened. Held, that the property was not sold and transferred within the meaning of the condition. The insured had still an insurable interest therein, and had not parted with all insurable interest therein;¹ there was not forfeiture.

In a case at Quebec, A insured for \$800. After the insurance the property was sold for taxes to B. Plaintiff A says: "that did not finally divest me," and before the fire he had redeemed his property. Held, the plaintiff did not lose his ownership by the sale for taxes; no absolute conveyance of title was to B. Judgment for A against the insurance company.³

A policy read, that in case of any change of title, etc., policy to cease. Four months before the fire the insured died, and his four heirs became entitled and vested. The policy was held of no use.³

A became a bankrupt; B, the statute assignee, insured the stock for the benefit of the estate. The creditors changed the assignee, and C became assignee. A fire occurred. Had the new assignee, without notice to the company before the fire, right to sue afterwards? The original Court held the negative. The judgment was reversed.⁴

A insures goods. He sells them to a firm in which he is a partner. Held, not to be fatal to A, because he did not sell all his property.⁵

Art. 2577 C. C. of L. C. A transfer of in-

¹ *Savage v. Howard Ins. Co.*, 7 Alb. Law J., p. 140.

² *Paquet v. Citizens Ins. Co.*, 4 Q. L. R. 231.

What of *vente à réméré* in France? Rolland de Villargues, p. 57, says the *vendeur à faculté de réméré* ceases to be proprietor; he is *complètement dessaisi*. Vo. *Réméré*.

³ *Lappin v. Charter Oak F. and Marine Ins. Co.*, New York, 1870; Vol. 5, Bennett's Ins. Cases; followed in 1878. Alb. L. J., June 1.

It would be so in Quebec unless there were a condition to the contrary. The policy in the above case could not have contained the exception of the Royal Insurance Company's policy, "except in cases of succession by reason of death of assured," and this exception is in our Civil Code, Art. 2576. But would the Civil Code override a policy not having such exception? *Señble*, Yes.

⁴ *Elliott v. Nat. Ins. Co.*, 1 Legal News, 450.

⁵ *Cowan v. Iowa State Ins. Co.*, 20 Am. Rep. 583.

interest by one to another of several partners or owners of undivided property who are jointly insured, does not avoid the policy.

Partners insure; one retiring, abandons all to the others without notice to the insurers. Fire happens; the Court held that assignment from one partner to his co-partners was not within the meaning of the condition in the policy (such as in the *Ætna supra*) against assignment.¹

Angell, § 200 a, does not commit himself by an opinion upon this decision. *Wilson v. Genesee Mutual* is preferred by Flanders, p. 476, 2nd Edn. Now, the Civil Code of L. C., Art. 2577, orders, as in the *Wilson* case, that cession of interest between partners or co-proprietors who insured conjointly may occur, without nullifying the policy. (*Semble*, unless condition *contra*.)

Three own a house and insure it. The policy contained a clause against alienation of the subject or any part of it. One of the insured afterwards sold to the other two, without consent of the insurers. This was held not to affect the policy. The sale was held not to be alienation within the meaning of the condition, but a mere change of interest among joint owners.² Angell § 197, noticing this case, does not commit himself by an opinion upon the judgment.

There must be a subsisting interest at the time of the loss, or the insured cannot recover, but it is not necessary, unless there is some specific provision in the policy to that effect, that the interest should be the same, either in quantity or nature, at the time of the loss as when the contract is made. Therefore, though the interest of the insured is changed from an absolute to a qualified or contingent ownership, or from a legal to an equitable interest, he may still recover, in case he suffers any loss, if his remaining interest is not one which the policy requires to be specifically described.

This doctrine has been applied to the case where the interest of the insured has, after the execution of the policy, been changed from the absolute ownership to that of mort-

gagor, in *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249, and *Jackson v. Mass. M. Fire Ins. Co.*, 23 Pick. 418, and to that of assignor for the benefit of creditors in *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76; S. C., 19 id. 81. *Stetson v. Mass. Mut. Fire Ins. Co.*, 4 Mass. 330. Would this be so, where a discharge is granted by the creditors? Not in Quebec; but such transfer to the creditors would end the assignor's interest.¹

In *Reed v. Cole*, 3 Burrow 1512, where one sold a ship on which he had effected an insurance, but agreed with the purchaser, that in case of her loss he would pay him five hundred pounds, it was held that he still possessed an insurable interest to that amount, for an injury to which he might recover under the policy effected by him before the sale.

As said before, policies are often effected to secure loans. A proprietor borrows money, insures his house in his own name, and afterwards transfers the policy to the mortgagee, to whom any loss is to be payable. A fire happens, but before it the original insured transferred his house without consent of the insurers, and his policy contained a condition such as the American one *supra* against alienation. In *Tillon v. Kingston M. Ins. Co.*, it was very improperly held that such conduct of the original insured could not defeat the right of the mortgagee.

More legal was the judgment of the N. Y. Court of Appeals in 1858, in *Grosvenor v. The Atlantic F. I. Co. of Brooklyn*, (Monthly Law Reporter of 1858.) M owned houses, and mortgaged them in favor of G. M insured in his own name; "loss, if any, to be paid to G." One condition of the policy was, that "in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without the consent of the company, the policy shall, thenceforth, be void and of no effect." Before the fire M sold the houses, without notice to, or consent of, the insurers. It was held that the policy was void, even as regarded the mortgagee.

¹ Suppose a man insured sell a house for £500, but retains mortgage for say £400, or £100 unpaid price. Alienation (under such clause as the *Ætna's*.) *Semble*, mutation would be seen in this case in Quebec, for the mortgagee is never proprietor here.

¹ *Wilson v. Genesee M. Ins. Co.*, 16 Barbour R. A. D. 1863.

² *Tillon v. Kingston M. Ins. Co.*, 7 Barb. R.

M at the time of the loss had no interest in the property insured. M sustaining no loss, the insurers were not liable to pay, so G had nothing to claim. G knew the conditions on which the insurers were to be liable. These were no less conditions after the assignment than before.¹

Angell, § 61, says the consent of the insurers that the policy issued to the owners of a property, may be assigned to the holder of a mortgage, will be deemed in the nature of a contract with him by which he becomes insured to the amount which the assignment was intended to secure. (Citing Tillon case.) Yes, but he may be affected in many ways by the original insured's breaches of conditions. This § 61 I disapprove.

Pouget, Dict. des Ass., vol. 2, p. 1103, says it is better to take a direct policy than an assignment of another man's, for in this last case the assignee is at the mercy of the assignor. A mortgagee had better not be content with a transfer of the mortgagor's policy.

A policy contained a condition that it should cease to have force if any change take place in the title or possession of the insured, whether by legal process, or judicial decree, or voluntary transfer. The insured was made a bankrupt and all his property became vested in an assignee. Fire happened. Held, that the insurers were free. The policy had ceased to have force, before the loss.²

In *Br. Amer. Ass. Co.*, appellant, and *Appleton Iron Co.*, respondent, (Supreme Court of Wisconsin) there was an insurance on moveables, with the condition that if the property be sold, or if any change take place in title or possession, whether by legal process or judicial decree, or voluntary conveyance, the policy shall be void. The insured became bankrupt, and had to transfer to a trustee under order of the Court. But the loss had all along been appointed to be paid to mortgagees whose claims exceeded the insurance. As such mortgagees in Wisconsin are con-

sidered owners and as having legal title to the property mortgaged, the policy was held not avoided; but it was conceded that had the subject insured been real estate, such bankruptcy proceedings, and assignment by the bankrupt under compulsion of a bankruptcy law, would be held an alienation or transfer fatal to the policy.

If the mortgagor insure his house in his own name and transfer the policy to the mortgagee, and afterwards sell the house to a third person without notice to the insurer and his consent, required by the policy, and fire happen, the mortgagee cannot recover. *Carpenter v. The Prov. W. Ins. Co.*, 16 Peters.

To which I add: If A, a mortgagee, insure for twelve months his interest in B's house mortgaged to him, *semble* though B afterwards sell, if the house be burned down within the twelve months, the insurers must pay.³

It was said in *Jackson v. Mass. Fire Ins. Co.*⁴ that the mortgage of a house takes nothing from the insurable interest of the mortgagor, even when the policy contains a clause that the policy shall be void if the property be alienated without the consent of the insurers.⁵ The rule is the same where only personal property is in question.⁶

A policy interest is assigned without transfer of subjects. The assignee of the policy must, after fire, prove that his assignor lost, and what he lost.⁷

A insures and mortgages his house to B, and B is registered by the insurance company as the transferee of the interest of A in the policy. A sells afterwards to C. Fire happens subsequently. Shall A recover? No. Shall B? Yes, said the majority of the Court, in the case of *McGillivray*. But I think that B cannot recover.

"Alienated by sale" means an absolute and

¹ Observe in Quebec the mortgagor is free to sell, does not cease to be owner, from the mere fact of mortgaging.

² 23 Pick.

³ *Rollins v. Columbian F. Ins. Co.*, 5 Foster.

⁴ *Rice v. Toner*, 1 Gray.

⁵ So I judged in *Whyte v. Home Ins. Co.*, Nov., 1871, which judgment was confirmed by the Court of Queen's Bench, two dissenting, and by the Privy Council.

¹ Yet in the Queen's Bench, 1879, Black's appeal, the Grosvenor case was not followed, 3 Leg. News, 29.

² *Perry, applt. v. The Lorillard F. Ins. Co.*, N. York, 1874, 19 Am. Rep.

unconditional sale. If an interest is reserved by the vendor, he *may* have an interest at the time of the loss, and may recover.¹

[To be continued.]

COUNSEL'S FEES IN 1676.

It is not an uncommon belief that incomes made at the bar at the present day far exceed those of earlier times. This is partly due to exaggerated accounts of what is earned being given in contemporary times, and to the fact that, if a counsel's fee-book is published at all, it is not likely to appear until long after his death. In the case of Sir John King, King's Counsel in Charles the Second's reign, who died on June 29, 1677, posterity has the advantage of the fact that one of his family compiled a memoir of him and his family which had been preserved for a hundred years, and which in 1782 was confided to the *Gentleman's Magazine* (vol. lii. p. 110). It appears from this document that John King was the eldest son of John King, M.D., of London, who was the son of John Le Boy alias King, a French refugee to England in 1572. He was born at St. Albans on February 5, 1629, went about the age of thirteen to Eton, was a king's scholar, was admitted into Queen's College, Cambridge, in November, 1655, and took the degree of B.A. His parents were determined that he should go to the Inns of Court to study the law. He wished to go into the Church, but he dutifully submitted and was entered a student of the Inner Temple in Michaelmas Term, 1660, and at the end of seven years was called to the bar. He practised first before the Court for the rebuilding of London after the Fire, and afterwards got better business in Westminster Hall, becoming first practitioner in the Court of Chancery. He was appointed a King's Counsel and Solicitor-General to the Duke of York, and on December 10, 1674, received knighthood. He married and had seven children. In the year 1676, he had in fees 4,700*l.*, and on the four days in Trinity Term, 1677, that he pleaded with

a fever on him, he had fees of 40*l.* and 50*l.* per day, as by his book entered by his own hand appeared. On the fourth day, to use the words of the memoir, 'being at the Chancery Bar he fell so ill of fever that he was forced to leave the Court and come to his chamber in the Temple with one of his clerks, who constantly waited on him and carried his bag of writings for his pleadings, and then told him he should return to every client his *breviat* and his fee, for he could serve no longer, for he had done with the world.' 'On July 4, his body was honourably buried, being carried from the Inner Temple Hall (the velvet pall on his coffin being borne by six of the honourable bench of the Inner Temple), honoured with the presence of the Right Hon. Heneage, Lord Finch of Daventry, Lord High Chancellor of England; Sir Harbottle Grimstone, Bart., Master of the Rolls; the judges and barons of his Majesty's Courts at Westminster Hall, the serjeants-at-law, benchers, and barristers and gentlemen students of the Honourable Society of the Inner Temple, to his grave near the effigies of the Knights Templars in the Round Tower of the Temple Church.' A lengthy memorial inscription, erected by his widow in the Round Tower, which ends '*dilecti, eruditi beati cineres,*' records the event. Four thousand pounds in the middle of the seventeenth century means some 16,000*l.* towards the end of the nineteenth, and that sum, it may be safely ventured, has not been reached by any barrister of nine years' standing, which is, in recent times, considered still young at the bar.—*Law Journal* (London).

RECOVERING BETS.

On January 15, before Mr. Justice Stephen and a common jury, the case of *Robson v. Cornbloom, Watson & Hurndall* was tried. The plaintiff, a gentleman residing at Newcastle, sued to recover the sum of 177*l.*, being a balance due to him by the defendants upon certain betting transactions. The defendants had carried on the business of betting commission agents at Boulogne-sur-Mer, and had issued circulars offering to do business upon advantageous terms. The plaintiff had commissioned them to lay 7*l.* for him upon a

¹ So said Mowat, arguing in *Sando v. Standard Ins. Co.*, 26 Grant, 113.

In *McQueen v. Phoenix Mut. Ins. Co.*, 4 Can. S. C. R. 660, the insured recovered, though he transferred to A B for his creditors, the balance to be paid to himself, etc.

horse, Claymore, to win the Manchester November Handicap at 20 to 1, also 5 l. upon the same horse for a place at 5 to 1. The defendants contended that they had made the bets as principals and not as agents, and pleaded the Gambling Act (8 & 9 Vict. c. 109, s. 18). The defendant Hurdall denied, further, that he was a partner in the firm, and that he was responsible for the acts of the other defendants.—From the evidence it appeared that the defendants commenced the business of commission agents towards the latter part of 1888, and employed a clerk called Barnes to manage it for them, with instructions to telegraph any bets made. Cornbloom and Watson were bookmakers in London, and Hurdall was a veterinary surgeon. The defendants had an account at the London and South-Western Bank, all the defendants having signed the customers' book. Soon after Hurdall became dissatisfied with the expenditure and wrote to the bank, claiming to be a partner and to have the right to stop the other two defendants drawing cheques. It further appeared that the defendants had sent to the plaintiff a voucher stating that 'they had obtained for him the bets in question.' Watson, in cross-examination, admitted that he knew the law that the plaintiff could not recover unless he could prove that the defendants had actually made the bets with third persons and received the money; and yet, after action brought, he had written admitting his liability. Mr. Justice Stephen summed up and regretted very much that the Courts had permitted a great breach to be made in the spirit of the Gaming and Wagering Acts by enabling persons to recover bets from an agent who had actually made them with third parties and received the money. It enabled the Acts to be completely evaded, and he hoped that a change would sooner or later be made in the law. Still, here they had to administer the law as it stood. The jury found a verdict for the plaintiff for the full amount claimed.—Mr. Candy applied for a stay of execution, but Mr. Justice Stephen declined to grant a stay, as he had no doubt about the case, but the defendants could apply to a Divisional Court if they pleased.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, April 26.

Dividends.

Re Blumenthal, Rosenthal & Co., St. Hyacinthe.—First and final dividend, payable May 13, J. Morin, St. Hyacinthe, curator.

Re A. E. Boisseau, Quebec.—Third and final dividend, payable May 12, H. A. Bedard, Quebec, curator.

Re Hector Bourassa, Three Rivers.—Dividend, payable May 15, U. Martel, Jr., Three Rivers, curator.

Re James Stuart Kennedy.—First and final dividend, R. N. England, Knowlton, curator.

Re J. N. P. Lafricain & Cie., St. Ambroise.—Dividend, payable May 20, Kent & Turcotte, Montreal, joint curator.

Re Lamarche, Prévost & Cie., Montreal.—First dividend, payable May 20, Kent & Turcotte, Montreal, joint curator.

Re Massé & Mathieu, Montreal.—First dividend, payable May 20, Kent & Turcotte, Montreal, joint curator.

Re A. Normandin.—First and final dividend, payable May 16, C. Desmarteau, Montreal, curator.

Re Joseph Pelletier & Cie.—First and final dividend, payable May 14, W. A. Caldwell, Montreal, curator.

Re J. A. Rafter & Son.—First dividend, payable May 20, Kent & Turcotte, Montreal, joint curator.

Re E. St. Amour *et al.*—First and final dividend, payable May 16, C. Desmarteau, Montreal, curator.

Separation as to Property.

Helen Caldwell vs. Joseph Adams, blacksmith, Huntingdon, April 18.

Marie Agnes Germain vs. Jean Baptiste Falardeau, Quebec, April 24.

Rosanna Lawlor vs. François X. Goyer, Montreal, April 18.

Martha Jane Whitney vs. James Calvin Moore, farmer, township of Kingsley, April 1.

Notarial minutes transferred.

Minutes of late G. F. Cleveland, N.P., Montreal, transferred to O'Hara Baynes, N.P., Montreal.

Quebec Official Gazette, May 3.

Judicial Abandonments.

Catherine Murray, widow of Hugh Drysdale, watchmaker and jeweller, Montreal, April 26.

GENERAL NOTES.

At the annual meeting of the bar of Montreal, May 1st, the following officers were elected:—*Bâtonnier*, F. L. Béique, Q.C.; *Treasurer*, J. Dunlop, Q.C.; *Syndic*, H. C. St. Pierre, Q.C.; *Secretary*, H. Lanctot; *Council*, S. Beaudin, Q.C., P. H. Roy, C. A. Geoffrion, Q.C., F. D. Monk, C. J. Doherty, Q.C., J. L. Arohambault, Q.C., W. W. Robertson, Q.C., H. Arohambault, Q.C.

The Legal News.

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SUPREME COURT OF CANADA.

Quebec.]

PIGEON V. RECORDER'S COURT.

Prohibition—By-law respecting sale of meat in private stalls—Validity of—37 Vic. ch. 51, sec. 123, subsec. 27 and 31, P.Q.—Intra vires of Provincial Legislature.

The Council of the City of Montreal is authorised by subsections 27 and 31 of sec. 123 of 37 Vic. ch. 51, to regulate and license the sale, in any private stall or shop in the city outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold on markets.

Held, affirming the judgment of the Court below, that the subsections in question are *intra vires* of the Provincial Legislature, and that a by-law passed by the City Council under the authority of the above-named subsections, fixing the license to sell in a private stall at \$200, is valid.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Madore* for appellant.
Ethier, Q.C., for respondents.

Quebec.]

HARDY V. FILIATRAULT.

Demolition of Dam—Transaction—Arts. 1918, 1920 C.C.—Report of Expert—Motion to hear further evidence.

In an action brought by a riparian owner asking for damages and the demolition of a second dam built by another riparian owner in contravention to the terms and conditions of an agreement made between the parties, while a judgment ordering the demolition of the first dam was pending in appeal, the Superior Court appointed a civil engineer as expert, who reported that the second dam did not injure the plaintiff's property. The Superior Court subsequently rejected a motion made by the plaintiff, asking to examine the said expert to explain his report, and dismissed the action with costs. This judgment was confirmed by the Court of

Queen's Bench for Lower Canada (Appeal side), and on appeal to the Supreme Court of Canada it was

Held, per Fournier, Gwynne and Patterson, J.J., that the provisions of arts. 1918 and 1920 C.C. under the title of Transactions were applicable to the agreement made in respect to the first dam, and that there was sufficient evidence in the case to dispose of the action by a judgment for the plaintiff. *Ritchie, C.J.*, and *Taschereau, J.*, dissenting.

Patterson, J., being of the opinion that as the principal ground of appeal was to have the case sent back to the Court of first instance for further evidence, he would agree with the dissenting judges not to do more for the plaintiff.

Appeal allowed with costs, and case remitted to the Superior Court.

Laflamme, Q.C., for appellant.

Geoffrion, Q.C., and *Beaudin* for respondent.

Quebec.]

DAVIS V. KERR.

Tutor and minor—Loan to Minor—Arts. 297, 298 C.C.—Obligation void—Personal remedy for monies used for benefit of minor—Hypothecary action.

Where a loan is improperly obtained by a tutor for his own purposes, and the lender, through his agent, has knowledge that the judicial authorisation to borrow has been obtained without the tutor having first submitted a summary account as required by art. 298 C.C., and that such authorisation is otherwise irregular on its face, the obligation given by the tutor is null and void.

The ratification by the minor after becoming of age of such obligation is not binding if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor.

If a mortgage granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action brought by the lender against a subsequent purchaser of the property mortgaged will not lie.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor has a

personal remedy against the minor when of age, for the amount so loaned and used.

Appeal allowed with costs.

Laflamme, Q.C., for the appellant.

Hutchinson, for respondent.

Quebec.]

PONTIAC V. ROSS.

Municipal aid to Railway Company—Debentures—Signed by Warden de facto—44 and 45 Vic. ch. 2, sec. 19, P.Q.—Completion of line—Evidence of—Onus probandi on defendant.

A municipal corporation under the authority of a by-law, issued and handed to the Treasurer of the Province of Quebec \$50,000 of its debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the Government provincial subsidy was payable under 44 and 45 Vic. ch. 2 sec. 19, viz: "When the road was completed and in good running order to the satisfaction of the Lieutenant Governor in Council."

The debentures were signed by S. M. who was elected warden and took and held possession of the office after W. J. P. had verbally resigned the position.

In an action brought by the railway company to recover from the treasurer of the Province the \$50,000 debentures after the Government bonus had been paid, and in which action the municipal corporation was *mise en cause* as a co-defendant, the Provincial Treasurer pleaded by demurrer only, which was over-ruled, and the County of Pontiac pleaded general denial and that the debentures were illegally signed.

Held, affirming the judgment of the Court below, 1st., That the debentures signed by the warden *de facto* were perfectly legal.

2. That as the Provincial Treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieut. Governor in Council, the onus was on the municipal corporation *mise en cause* to prove that the Government had not acted in conformity with the statute. Strong, J., dissenting.

Appeal dismissed with costs.

Langelier, Q.C., and *McDougall* for appellant.

Irvine, Q.C., and *D. Ross*, for respondent.

SUPERIOR COURT—MONTREAL.*

Cours d'eau—Droit de riverain—C.C. 503.

Jugé:—1o. Que lorsqu'un cours d'eau a son lit dans un chemin, le propriétaire voisin du chemin peut réclamer les droits de riverain lorsque le cours d'eau a son lit dans la partie du chemin contiguë à son fonds.

2o. Que lorsqu'un fonds traversé par un cours d'eau est morcelé, les portions du fonds qui sont devenues non riveraines conservent néanmoins le droit aux eaux dont elles jouissaient avant la division.

3o. Que les intéressés peuvent régler le cours des eaux; qu'un riverain qui a demandé à un tiers sa souscription pour le posage de tuyaux servant à l'écoulement des eaux n'est pas admis à plaider que ce tiers n'a pas droit à la jouissance du cours d'eau.

—*Godin v. Lortie, et Lortie*, dem. en gar. v. *Swail*, Tait, J., 31 janvier 1890.

Company—Reduction of capital stock—Mandatory—Art. 1716, C.C.

Held:—1. Where the Act incorporating a company provided that the capital stock should be \$600,000, and that the company might commence business when that amount should have been subscribed and one-third of it paid in: that a resolution whereby the directors pretended to reduce the capital stock to a less amount than \$600,000, was *ultra vires* and null and void.

2. That under Art. 1716, C.C., a mandatory who subscribes stock in a company in his own name, is liable to creditors of the company as a shareholder, without prejudice to the creditors' rights against the mandator also.—*Molsons Bank v. Stoddart*, Pagnuelo, J., Feb. 3, 1890.

Attorney—Costs—Discontinuance of action without consent of attorney—Fraud.

Held:—1. That a plaintiff is always, in his own interest, the master of his case, and has at all times, while acting in good faith and in his own interest, the right to effect a settlement on any terms which to him seem fit, and to discontinue his suit, without the consent of his attorney *ad litem*, even when the latter has demanded distraction of costs.

* To appear in Montreal Law Reports, 6 S. C.

2. But although an attorney *ad litem* can only look to his client for the payment of his costs so long as distraction thereof has not been granted to him, and although he has no right in the ordinary course to continue a suit in his own interest and solely to obtain judgment for his costs against the adverse party with distraction in his favor, he may nevertheless obtain the permission of the Court to continue the action exclusively in his own interest for his costs, when a settlement has been effected and a discontinuance has been filed with the intention by both parties, or on the part of one with the connivance of the other, to defraud him of his rights.—*Farquhar v. Johnson, & Chapleau et al.*, petitioners, Würtele, J., Nov. 25, 1889.

Slander—Mayor of village—Imputation of bigotry—Exemplary damages.

The defendant called the plaintiff, who was mayor of the village, a bigot, and said that his conduct as mayor was influenced by his bigotry.

Held:—That these words were actionable *per se*, and that a small amount might be awarded as exemplary damages, though no actual damage was proved.—*Wickham v. Hunt*, Würtele, J., Nov. 5, 1889.

Pension alimentaire—Résidence commune.

Jugé:—1o. Qu'une belle-mère doit une pension alimentaire à sa bru incapable de gagner sa vie et celle de son enfant, incluant une provision pour l'éducation de l'enfant;

2o. Que lors qu'il existe un désaccord et une incompatibilité de caractère entre la belle-mère et sa bru, l'offre de la belle-mère de recevoir chez elle la bru ne sera pas acceptée, et elle sera condamnée à payer une pension alimentaire.—*Mulligan v. Patterson*, Würtele, J., 20 janv. 1890.

Tarif des droits dus au protonotaire et des honoraires dus aux avocats—Cas non prévus par le tarif.

Jugé:—1o. Que les cas non prévus par le tarif doivent être décidés par analogie avec les cas semblables prévus par le tarif;

2o. Que le tarif n'ayant pas prévu quels sont les droits dus au pétitionnaire et les

honoraires dus aux procureurs sur une requête en destitution d'huissier, et sur les procédures y-relatives, c'est l'article 83 du tarif des avocats, relatif aux nominations de tuteurs, curateurs, émancipations, etc., qui doit régler les honoraires des procureurs, et, comme conséquence, ce sont les articles 8, 9 et 114 du tarif du protonotaire qui doivent régler ces honoraires. — *Corporation des Huissiers v. Caisse*, Jetté, J., 4 janvier 1890.

Maitre et employé—Responsabilité—Accident—Negligence contributive.

Jugé:—1o. Qu'un maitre qui emploie des journaliers est responsable des dommages qu'ils souffrent par suite d'un accident arrivé par le mauvais état des outils ou des machines qu'il met à leur usage.

2o. Que le maitre n'est pas déchargé de sa responsabilité parce que le serviteur aurait été imprudent et aurait désobéi à ses ordres, pourvu que ce dernier ne soit pas la cause première de l'accident.—*Gingras v. Cadieux*, en Révision, Johnson, J.C., et Loranger, Würtele, J.J., 28 février 1890.

Costs—Plaintiff successful for part of demand—Discretion as to costs—Art. 478, C. C. P.

Held:—1. A judgment will be revised and reformed by the Court of Review on a question of costs, where the Court below, in adjudicating on the costs, acted upon a wrong principle.

2. (Reversing the judgment of MATHIEU, J.) Where the action is brought to recover a claim not composed of distinct parts, or where the plaintiff cannot with some exactitude foresee the amount for which he can obtain judgment, (as in actions of damages and cases of a like nature), and the plaintiff's right of action is maintained, but the Court awards him less than the amount demanded, it is error for the Court to condemn him to pay the defendant (who has made no tender) the difference of costs of contestation between an action for the amount recovered and the action as brought, and such an award of costs is not within the discretion allowed the Court by Art. 478, C. C. P., and will be reversed on appeal to the Court of Review.—*Clermont v. McLeod*, in Review, Johnson, Loranger, Würtele, J.J.,

March 29, 1889; and *Daoust v. Dumouchel*, in Review, Johnson, Ch. J., Gill, Tait, JJ., Jan. 13, 1890.

Nom—Propriété—Injonction.

Jugé:—10. Que le nom d'un commerçant est sa propriété exclusive, et que personne autre que lui ne peut se servir de son nom sans son autorisation.

20. Qu'une personne dont on usurpe ainsi le nom a droit à une injonction contre l'usurpateur.—*Dun et al. v. Croysdill*, Mathieu, J., 13 nov. 1889.

Prescription—Interest on Judgment—Art. 2250, C. C.

Held:—That Art. 2250, C. C., which declares that, with the exception of what is due to the Crown, all arrears of interest are prescribed by five years, applies to interest on a judicial condemnation. *Jetté v. Crevier, & Crevier*, oppt., in Review, Lorranger, Würtele, Davidson, JJ., March 31, 1890.

Lessor and lessee—Lease of telegraph system for 97 years—Arts. 887 et seq. C. C. P.—R. S. Q. 5977.

Held:—1. An agreement by which a company undertakes to operate the telegraph system of another company for a term of 97 years, and to pay quarterly a fixed sum for the privilege, is in effect a lease, and, although made for a term exceeding nine years, is an ordinary and not an emphyteotic lease, there being no right of ownership conveyed to the lessee.

2. Under Art. 887, C. C. P., as reproduced in R. S. Q. 5977, all actions arising from the relation of lessor and lessee are subject to the summary jurisdiction therein established, and therefore an action by the above mentioned company lessee against the company lessor, for diminution of rent, is subject to such summary jurisdiction. *G. N. W. Telegraph Co. v. Montreal Telegraph Co.*, Mathieu, J., March 27, 1889.

Lessor and Lessee—Arts. 1612, 1614, 1618, C. C.

—*Disturbance of lessee's use—Claim for reduction of rent—Trespass—Judicial disturbance.*

Held:—1. Until a judicial disturbance has

arisen, and a partial eviction has been the consequence thereof, no claim by a lessee for a reduction of rent can be maintained. A judicial disturbance may arise either by an action of a third person setting up a claim of right to the detriment of the lessee, or by an exception setting up a claim of right, in answer to an action for damages brought by the lessee against a trespasser.

2. A lessee who is disturbed in his possession by the material act of a third party, whatever may be the assertion of right made by such third party at the time of the commission of the act, should treat such disturbance as a mere trespass, and should bring suit against the trespasser, for the recovery of the damages which he has suffered by reason of such trespass, and to prohibit the trespasser from further disturbing him in his enjoyment. If the trespasser by his plea raises a claim of right, the lessee should notify the lessor of the disturbance, and can then bring an action in warranty against the lessor for the purpose of obtaining a reduction of rent and damages. *Great North Western Telegraph Co. v. Montreal Telegraph Co.*, Würtele, J., January 31, 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER I.

OF THE CONTRACT OF INSURANCE, HOW MADE, WHEN PERFECTED, AND OF THE APPLICATION.

(Continued from page 151.)

§ 14. *Description of title of insured.*

There should be a just, full, and true exposition of title in the application. An example of a vague one is to be found in this case: The question was asked, "Is your title absolute? If not state its nature (i.e. of the interest)." The application was filled up, "deceased wife held the deed." The application went in; a policy was issued; but after the loss the company declined to pay.¹

¹ *Rohrbach v. Germania Fire Ins. Co.*, (Court of Appeals, New York, May, 1875), 5 Bennett, 744. *Semble*, the company ought to have refused the application.

See further as to the application under heads of "subject insured," and misdescription.

Art. 2569, C.C.L.C., says the interest of the insured is to be stated in the policy.

§ 15. *Fire insurance in France.*

In old France fire insurance as now known was little practised, but the contract was lawful and could subsist without a policy. It was complete upon the consent of the parties. In modern France the contract may be made out from a policy, notarial act, private writings, receipts for premiums, and so forth; and parol evidence will be admitted to complete the proofs. Pardessus says that between traders (*commerçants*) proof of the contract may be by mere parol, but he is in error. Dalloz, Jur. du Royaume, Vol. for 1859.

Article 195 of the Code de Commerce orders sales of ships to be in writing, yet they may in France be verbal only, *inter paries*. The Code de Commerce is not so prohibitory as the English Ship Registry Act. Yet Pouget lays it down that for insurance a writing is necessary, and a duplicate (*double*) even, unless there be an acknowledgment in the policy of the payment of the premium. Duplicates (*doubles*) are not required in commercial matters, and companies are sued in France before the Tribunaux of Commerce even on "assurances terrestres." Yet in France in "assurance terrestre" *doubles* are usual.

§ 16. *Proof of the contract.*

An insurance under 100 livres could be proved by mere parol in old France (Valin), and so in modern France (Merlin and Locré). C.C. 332 is to be understood so, and is not contrary. Merlin, Questions de droit, vo. Police, et Contrat d'Assurance.

In *Sanborn et al. v. Fireman's Insurance Co.*, decided in November, 1860,¹ it was held (per Hoar, J.) that the "contract of insurance is not required to be in writing, by common law, nor by any statute of Massachusetts. . . . An agreement for it, if sufficiently proved by oral testimony, will be enforced."

Duer is not opposed to the above; but says it is doubtful whether an action on such proofs alone would be maintained, usage of

written contract has so long prevailed. See also 1 Phill. Ins. § 8.

In *Cockerill v. Cincinnati Mutual Ins. Co.*,¹ it was held that a writing is absolutely required for maintenance of an action as on a contract of insurance.

It was said *per* Hoar, J., in *Sanborn et al. v. Fireman's Ins. Co.*,² that the principle of *Head v. Providence Ins. Co.*,³ is not unsound, that a corporation can have no powers but such as the Act creating it gives, but the application of the principle has been modified in later cases; as in *Tyloe v. Merchants Fire Ins. Co.*;⁴ also, in *Commercial Marine Ins. Co. v. Union Mutual F. Ins. Co.*⁵

So where the charter says that the company may contract so and so, but without words of restriction, the company is not restrained from contracting otherwise.⁶

In New York, a parol agreement to insure binds the insurance company⁷ to issue a policy for the amount. It is otherwise in Georgia by statute. But in New York there must be a completed contract.

An insurance company cannot refuse to execute a policy where a contract for insurance is proved and the premium has been taken; but if the premium has been promised merely, and the promisor has been put in default to pay, the insurance company is not bound.⁸

§ 17. *The law in the United States as to the mode of insurance.*

Whether a valid contract of insurance can

¹ 16 Ohio.

² 16 Gray.

³ 2 Cranch.

⁴ 9 Howard.

⁵ 19 Howard.

⁶ 19 Howard, 321.

⁷ *Finke v. Cottinet*, 14 Am. Rep. 715. The plaintiff had no policy, had paid no premium—payment was waived till policy. Before the policy was issued from the Head Office, the fire occurred. The Company was condemned to pay.

Audubon v. Excelsior Insurance Co., 27 N. Y. Rep. But if the charter of the company order otherwise no parol contract can bind; as where a Statute says that all applications shall be written or printed, and all conditions printed or written, and all policies or contracts shall be signed by the President;—*Henning v. The U. S. Insurance Co.* (Missouri) 4 Am. Rep.

⁸ *Sanford v. The Trust F. Ins. Co.* N. Y. 1842, Chancery. The bill in this case was to enforce a parol contract for insurance; the premium was tendered after the fire.

¹ 16 Gray's Rep.

be made in the United States without a policy or writing seems not to be settled. Upon the principles of the common law an unwritten or parol contract is sufficient. Still, the force of language and the general practice some would hold to be evidence of the legal necessity for a written contract. Where the insurer is a corporation, its statute of incorporation might often be decisive of the question.¹

In the absence of such a statute, ordering a policy, if a contract to insure be made, mere want of policy will not, ordinarily, prevent a plaintiff from recovering.

Though corporations have generally no powers but what have been granted to them, a company incorporated in the Province of Quebec to carry on the business of insurance may insure without writing. It would be allowed to do all business of insurance by all modes or forms of contract not prohibited.

In Massachusetts, in the case of *Thayer v. Middlesex Mutual F. Ins. Co.*, which was an action on an oral agreement to insure, such agreement, it was held, would be binding; but in this particular case, it was held that there had been no contract, but a mere negotiation which had not resulted in one.

In Maine they hold that by the common law the contract need not be in writing, and that there is nothing in the statutory law requiring it.²

In Georgia the Code requires all contracts of insurance to be in writing, and any alteration to be also in writing. The common law there did not require it.³

It has been held in Massachusetts and New York that the existence or delivery of a policy is not necessary to the validity of the contract, but that any written assent by the one party, within a reasonable time, to the proposal of the other, is sufficient to form the contract. Frequently a memorandum describing briefly the risk and premium is made by the insurers and entered in their books, or a receipt for premium specifying the subject and sum insured, the duration of the risk, and that a policy will be issued, is de-

livered to the insured, and the insurers have been held bound thereby as by a policy. These courses are taken when it is inconvenient or impossible to issue a policy at the time. Such practices, if adopted by them, might reasonably bind even incorporated companies, though having power to make contracts only by policy.

It is said by Shaw to have been held in Louisiana, that there the contract must be in writing. He refers to *Walden v. Louisiana Ins. Co.*, 12 La. R., but upon looking at the report I do not see that it was so decided.

§ 18. Contracting by agents.

In insuring, we may, of course, contract either by ourselves or by our agents. In marine insurance the insurer generally knows only the agents, and usage was inveterate to allow insurers to sue even agents for premiums; and they were held liable jointly and severally as the insured were. See Pothier, Assurance No. 98.

§ 19. Insurance by agents of foreign Company.

If an agent here of a company abroad insure here, it is as if his company did¹. But not so if the transaction be by an agent—(say in Edinburgh,) a mere intermediary, with no power to bind,—the insurance being really made in England and the policy dated there, upon proposals sent through the Edinburgh agent.²

§ 20. What the policy should contain.

The premium is generally a sum of money. The policy ought to mention clearly the names and qualities of the parties, the property insured, the premium, and all conditions. Where made by an incorporated company, it ought to be signed by the officer or officers designated for the purpose by the charter.

§ 21. Acceptance of proposals of insurance.

Acceptation of a proposal for insurance constitutes a valid agreement to insure, unless the law orders that, as to any particular company or insurer, they be allowed to con-

¹ 2 Cranch, 166.

² *Walker v. Metropolitan Insurance Co.*, 5 Bennett.

³ *Simonton et al. v. London, Liverpool & Globe Ins. Co.*, 5 Bennett's Insurance cases.

¹ *Albion Ins. Co. v. Mills*, 3 W. & S. Westlake, 5, 212.

² *Parker & Royal Ex. Ass. Co. Jan'y. 1846. Savigny*, by Guthrie p. 216. *Aliter* if agent can bind the Co. *Mills v. The Albion M. Co.*, 3 W. & S.

tract only in another and particular form. C.C. of Lower Canada, 2481.¹

§ 22. *Interim Receipt Cases.*

In *Goodwin v. Lancashire F. & L. Ins. Co.*,² an interim receipt was granted by an agent. Then there was a cancellation of it from the Head office, before the fire, but the notice of cancellation did not reach the insured till after the fire. The insured had played a trick on the company, applied to one agent and was refused, then applied to a second, not mentioning the refusal by the first, and got an interim receipt. An action being brought after the fire, fraud was pleaded by the company, and the concealment of the earlier refusal. The Court of Review held that there was no action.³ But the Queen's Bench condemned the insurance company,⁴ and held the suit good (though brought within the sixty days); that the conditions of the ordinary policies of the company could not control, and that the insured was insured till the company's revocation reached him. The judges appear to have paid no attention to the objection of concealment of the refusal, though that fact was alleged to be material.

[To be continued.]

THE LATE MR. J. M. LORANGER, Q.C.

It is a task of more than ordinary sadness to endeavor to express the loss, the great and abiding loss, which the bar has sustained in the removal of Mr. Joseph M. Loranger, who passed away at his residence in Montreal on

Saturday, the 17th instant, in his fifty-sixth year. Mr. Loranger had been in delicate health for some time, in fact ever since a serious accident befell him some years ago, resulting in a broken limb. During the past winter he had the misfortune to experience an unusually severe attack of the prevailing influenza, and though his buoyant and courageous spirit made a brave effort to rally, other ailments supervened, and his constitution, already enfeebled by illness, succumbed under the additional strain.

Mr. Loranger was admitted to the bar in 1855, and during a professional career of five and thirty years was characterized by a genial and sympathetic courtesy which endeared him to all who were brought into contact with him. The law to him was not a mere money-getting occupation, as it is sometimes regarded, but an honorable profession, evoking and exercising the highest qualities of mind and heart. His blameless life and high standard of conduct afforded a model worthy of imitation by the younger members of the profession. Towards the close of his life, his bright and chivalrous spirit rose superior to physical ailments, and his devotion to professional duty held him perhaps too long to work which overtasked a system needing rest and change for its restoration. Such men can ill be spared in any calling.

Mr. Loranger had two brothers on the bench of the Superior Court; one, an older brother who left a bright record, died some years ago. A younger brother, the present Judge, still occupies a distinguished place upon the bench.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, May 3.

Curators appointed.

Re Charles Sharpe Aspinall, manufacturer, Montreal, —A. F. Riddell, Montreal, curator, April 24.

Re Adolphe A. Boucher.—C. Millier and J. J. Griffith, Sherbrooke, joint curators, April 28.

Re Demers & Riverin, Quebec.—D. Arcand, Quebec, curator, April 29.

Re Marie Clorinde Elmire Nolin.—Bilodeau & Renaud, Montreal, joint curators, April 29.

Re A. Gagnon & Co., Lévis.—D. Arcand, Quebec, curator, April 29.

Re Ludger Gamache, trader, Quebec.—H. A. Bedard, Quebec, curator.

¹ On a bill to compel an insurance company to grant a policy of insurance, it was held that the agent in London of a provincial insurance company must not exceed his authority. If authorized only to receive applications for insurance, and these applications be in form of words that "premium is to be paid when policy is presented to insured," the payment of premium to an agent in London, before, operates no insurance, nor a contract to grant a policy; and though the agent send such money to his principals, they may refuse to insure, and may return the money; —*Linford v. The Provincial H. & C. Ins. Co.*, English Jurist, A.D. 1864, p. 1066.

² 16 L. C. Jurist.

³ *Broening v. Provincial Ins. Co. of Canada*, (in the Privy Council in 1873) supports one of the rulings of the Court of Review.

⁴ 18 L. C. Jurist.

Re P. Houle, Ste. Perpétue.—Kent & Turcotte, Montreal, joint curator, April 30.

Re William Kennedy, Montreal.—H. A. Jackson, Montreal, curator, April 2.

Re Lamoureux & frère.—Bilodeau & Renaud, Montreal, joint curator, April 28.

Re Amable D. Porcheron.—C. Millier and J. J. Griffith, Sherbrooke, joint curator, April 28.

Re Léandre Proulx.—C. Millier and J. J. Griffith, joint curator, April 28.

Dividends.

Re Thos. Acteson, trader, l'Anse aux Gascons.—First and final dividend, payable May 19, H. A. Bedard, Quebec, curator.

Re Octave Bernard, contractor, St. Hyacinthe.—First dividend, payable May 21, J. Morin, St. Hyacinthe, curator.

Re Henri Desureault, St. Narcisse.—First and final dividend, payable May 20, Kent & Turcotte, Montreal, joint curator.

Re P. Gingras & Cie. coal dealers, Quebec.—First and final dividend, payable May 19, N. Matte, Quebec, curator.

Re Marie Louise Godbout (N. Godbout & Cie.).—First and final dividend, payable May 21, C. Desmar-teau, Montreal, curator.

Re Geo. Lemieux & Co., traders, Fraserville.—First and final dividend, payable May 19, H. A. Bedard, Quebec, curator.

Re Joseph Pelletier, Montreal.—First and final dividend, payable May 20, Kent & Turcotte, Montreal, joint curator.

Re Wm. Silverstone, Montreal.—First and final dividend, payable May 20, Kent & Turcotte, Montreal, joint curator.

Separation as to property.

Mathilde Blanchette vs. François Xavier Mercier, trader, St. Hyacinthe, April 21.

Mary L. Moran vs. Michael H. Kelpyn, contractor, Montreal, April 28.

Quebec Official Gazette, May 10.

Judicial Abandonments.

David Ethier, Montreal, April 30.

Jean Baptiste Généreux, trader, parish of St. Guillaume d'Upton, May 7.

Phillips & O'Sullivan, plumbers, Quebec, April 24.

Curators appointed.

Re Ephraim E. Bouchard, St. Etienne de Bolton.—W. J. Briggs, Waterloo, curator, April 25.

Re Dame C. Murray.—W. A. Caldwell, Montreal, curator, May 3.

Re David Ethier.—C. Desmar-teau, Montreal, curator, May 7.

Re Alexis Paradis, Quebec.—M. P. Leberge, N.P., Quebec, curator, May 7.

Re Hilaire Picard.—C. Desmar-teau, Montreal, curator, May 1.

Re James H. Rafter, Montreal.—Kent & Turcotte, Montreal, joint curator, May 2.

Re Tancred Robitaille, trader, St. Hyacinthe.—J. Morin, St. Hyacinthe, curator, May 2.

Dividends.

Re Jos. Beaudoin, St. Luc de Champlain.—First and final dividend, payable May 27, C. Desmar-teau, Montreal, curator.

Re Ezra Bigelow, Georgeville.—First and final dividend, payable May 26, C. H. Kathan, Rock Island, curator.

Re François Chaumelle.—First and final dividend, payable May 27, J. B. H. Beauregard, Iberville, curator.

Re Ambroise De Blois, grocer, St. Sauveur de Québec.—First and final dividend, payable May 26, N. Matte, Quebec, curator.

Re Dame M. L. Danis, widow of O. P. Allard, Montreal.—Second and final dividend, payable May 26, T. Gauthier, Montreal, curator.

Re Dragon & frère.—First and final dividend, payable May 22, Bilodeau & Renaud, Montreal, joint curator.

Re Flavien Genest, Cap de la Magdeleine.—First and final dividend, payable May 27, Kent & Turcotte, Montreal, joint curator.

Re Isaac Léopérance, butcher, Montreal.—First dividend, payable May 26, B. Jubinville, Montreal, curator.

Re Wilfrid Major.—Second and final dividend, payable, payable May 22, Bilodeau & Renaud, Montreal, joint curator.

Re E. D. Marceau, trader, l'Isle Verte.—First and final dividend, payable May 26, H. A. Bedard, Quebec, curator.

Re Johnny Morrissette, trader, St. Charles.—First and final dividend, payable May 26, H. A. Bedard, Quebec, curator.

Re George Ouellet.—First and final dividend, payable May 26, C. Desmar-teau, Montreal, curator.

Re Jean-Bte. Pare.—First and final dividend, payable May 31, J. L. Coutlee, Montreal, curator.

Re Pouliot & Falardeau, curriers, Quebec.—Second and final dividend, payable May 26, N. Matte, Quebec, curator.

Re Abel Valin.—First and final dividend, payable May 28, C. Desmar-teau, Montreal, curator.

Separation as to property.

Marie Elvina Chapleau vs. Jean Ete. Richer, trader, Montreal, May 7.

Marie Méline Codère vs. Alphonse Richard, plumber, Montreal, May 3.

The Legal News.

VOL. XIII. MAY 24, 1890. No. 21.

SUPREME COURT OF CANADA.

Ontario.]

PARTLO V. TODD.

Trade mark—Registration—Effect of—Exclusive right—Property in words designating quality—Rectification of registry.

P., a manufacturer of flour, registered a trade mark, under the Trade Mark and Design Act, 1879 (42 Vic. ch. 22), consisting of a circle containing the words, "Gold Leaf," surrounded by the No. 196 and with the word "flour," and P's name underneath, the whole surrounded by the words "Ingersoll Roller Mills, Ont., Can." In an action against T, for using a similar mark, and selling flour purporting to be the "Gold Leaf" of P., the defendant was allowed to offer evidence to show that "Gold Leaf" was a description applied to flour made by a particular process and was in common use by the trade, both in Ontario and the Maritime Provinces, prior to the registration of such trade mark. Section 8 of the Act provided that after registry, the person registering a trade mark "shall have the exclusive right to use the same to designate articles manufactured by him," and the said evidence was objected to on the ground that under this section the validity of the trade mark could not be impugned.

Held, affirming the decisions of the Divisional Court (12 O. R. 171) and of the Court of Appeal (14 O. A. R. 444) Taschereau, J., dissenting,—that the evidence was properly admitted; that a trade mark is not made such by registration, but it is only a mark or symbol in which property can be acquired and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use that can properly be registered; and that the statute does not prevent a person accused of infringing a trade mark from showing that it is composed of words or symbols in common use to which no exclusive right of user can attach.

Held also, that where the statute prescribes no means, by way of departmental procedure or otherwise, for rectification in case of a trade mark so improperly registered, the Courts may afford relief by way of defence to an action for infringement.

Held per Gwynne, J., that property cannot be acquired in marks, etc., known to a particular trade as designating quality merely, and not, in themselves, indicating that the goods to which they are affixed are the manufacture or stock in trade of a particular person. Nor can property be acquired in an ordinary English word expressive of quality merely though it might be in a foreign word or word of a dead language.

Appeal dismissed with costs.

W. Cassels, Q. C., for the appellant.

Moss, Q. C., and McCarthy, Q. C., for the respondent.

Ontario.]

BROWN V. LAMONTAGNE.

Chattel mortgage—Fraud against creditors—Prior agreement—Additional chattels in mortgage—Effect of.

B. sold a quantity of machinery, tools and fixtures to one P. for \$3120.96. The goods were in a factory owned by B., and were to be paid for by monthly payments extending over a period of forty-eight months. P. agreed to keep them insured in favour of B. and to give B. a hire receipt or chattel mortgage as security for payment. P. was put in possession of the property, and received letters from B. recommending him to certain merchants in Montreal, and he went to Montreal and purchased goods from L. among others. Two months after, L. sued P. for the price of goods so purchased, amounting to about \$1000, and after being served with the writ in such suit, P. gave B. a chattel mortgage on the goods originally purchased and other goods which it was alleged, would have been included in the purchase from B. had it not been claimed that they were not in the factory at the time, but were afterwards found to be there. P. had not given a hire receipt or chattel mortgage at the time of the original purchase from B.

L. having signed judgment against P., issued executions and caused the mortgaged

goods to be seized thereunder. On the trial of an interpleader issue to try the title in said goods, judgment was given in favour of B. for the goods originally sold to P. but not for those added in the mortgage. The Divisional Court held on motion to set aside this judgment, that the mortgage was void for the inclusion of the goods not mentioned in the original agreement, and reversed the judgment at the trial in B's favour. This decision was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada:

Held, that the judgment of the Court of Appeal was right and should be affirmed.

Appeal dismissed with costs.

O'Gara, Q.C., for the appellant.

Belcourt, for the respondent.

Nova Scotia.]

FORSYTH V. BANK OF NOVA SCOTIA.

In re BANK OF LIVERPOOL.

Insolvent Bank—Winding up Act—Appointment of liquidators—Discretion of judge.

The liquidators appointed by a judge of the Supreme Court of Nova Scotia to wind up the affairs of the insolvent Bank of Liverpool, were those nominated at the meeting of creditors called for that purpose according to the requirements of the Winding-up Act R. S. C. c. 129. The Bank of Nova Scotia was one of the said liquidators, and by a judge's order, the local manager at Halifax was appointed to act for the bank in such liquidation. On appeal to the Supreme Court of Canada from the decision of the Supreme Court of Nova Scotia affirming the appointment of liquidators:

Held, that a bank can be one of the liquidators of a bank under the Winding-up Act.

2. That the Act does not require the nominees of both creditors and shareholders to be represented on the board of liquidators, and the judge having, in his discretion, appointed the representatives of one class only to be appointed such, such discretion should not be interfered with.

3. The appointment would not be overruled by an appellate Court unless it appeared that the judge making it was clearly wrong in his law, or that he acted under an evident mistake as to the facts.

Appeal dismissed with costs.

C. W. Weldon, Q.C., for the appellants.

R. L. Borden, for the respondents.

Nova Scotia.]

WYMAN V. IMPERIAL INSURANCE CO.

Fire insurance—Insurable interest—Mortgagee—Assignment of policy.

In 1877 T. held a policy of insurance on his property which he mortgaged to W. in 1881, and an endorsement on the policy, which had been annually renewed, made the loss payable to W. In 1882, T. conveyed to W. his equity of redemption in the property, and a few months after, at the request of W., an endorsement was made on the policy, permitting the premises to remain vacant. The policy was renewed every year until 1885, when all the policies of the insurance companies were called in and replaced by new policies, that held by W. being replaced by another in the name of T., to which W. objected and returned it to the agent, who retained it. The premiums were paid by W. up to the end of 1886.

The insured premises were burned, and a special agent of the company, having power to settle or compromise the loss, gave to W. a new policy in the name of T., having the vacancy permit and an assignment from T. to W., endorsed thereon and containing a condition not in the old policy, namely, that all endorsements or transfers were to be authorised by the office at St. John, N.B., and signed by the general agent there. The company having refused payment, an action was brought on the new policy against them, and the agent who first issued the policy to T. was joined as a defendant, relief being asked against him for breach of duty and false representations. The Supreme Court of Nova Scotia set aside a verdict for the plaintiff in such action, and ordered a new trial on the ground that his interest was not insured, and that T. had no insurable interest to enable W. to recover on the assignment. On appeal from such decision to the Supreme Court of Canada:

Held, reversing the judgment of the Court below (20 N.S. Rep. 487) that the company having accepted the premiums from W. with knowledge of the fact that T. had ceased to

have any interest in the property, they must be taken to have intended to deal with W. as owner of the property, and the contract of insurance was complete.

Appeal allowed with costs.

Graham, Q. C., for appellants.

Henry, Q. C., for respondents.

New Brunswick.]

MARITIME BANK OF CANADA V. THE RECEIVER
GENERAL OF NEW BRUNSWICK.

*Insolvent bank—Winding-up Act—Assets—
Crown prerogative—Right of Provincial
Government to exercise—Lien.*

The Government of New Brunswick, as creditors of the insolvent Maritime Bank of Canada, claimed a first lien on the assets of the bank, as representing the Crown in the Province.

Held, reversing the judgment of the Supreme Court of New Brunswick, Gwynne, J., dissenting, that the Government was entitled to such lien; But

Held also, Strong and Taschereau, JJ., dissenting, that the lien was to be exercised only after the note-holders were paid, the prerogative being postponed to the lien of the note-holders by virtue of Bank Act, R. S. C. c. 120 s. 79.

This case was decided by Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

A. A. Stockton and C. A. Palmer, for appellants.

Blair, Atty. Gen. of New Brunswick, and *Barker, Q. C.*, for the respondents.

New Brunswick.]

MARITIME BANK OF CANADA V. THE QUEEN.

*Prerogative of Crown—Insurance Company—
Money deposited in insolvent bank—Lien for.*

The Dominion Safety Fund Life Association, a mutual insurance society doing business in Canada, deposited \$45,000 in the Maritime Bank of Canada at St. John N. B., and sent the deposit receipt to the Receiver General of the Dominion to hold as the deposit of the Association with the Government as required by the Insurance Act, R. S. C. c. 124. The Maritime Bank having become insolvent a claim was made by the Dominion Government for this sum of \$45,000 and a

further sum of \$15,000 held on ordinary deposit in the bank by the Crown to be recognised as Crown monies and entitled to a first charge upon the assets.

Held, affirming the judgment of the Supreme Court of New Brunswick, Gwynne, J., dissenting, that the Dominion Government as representing the Crown in Canada was entitled to a first lien upon the assets of the insolvent bank in respect to the said sum of \$15,000, and that the lien was not taken away by the section of the Bank Act R. S. C., c. 120, which gives note holders a first lien on such assets, it not being competent for the legislature to deprive the Crown of its prerogative except by express words to that effect. See The Interpretation Act, R. S. C. c. 1, s. 7 subsec. 48.

Held, also, reversing the judgment of the Court below, Strong, J., dissenting, that the Government could not claim such lien in respect of the sum deposited by the insurance association, it not being public money but held by the Crown merely as trustees for the society.

The judges deciding this case were Sir W. J. Ritchie, C. J., and Strong, Taschereau, Gwynne and Patterson, J. J.

Appeal allowed as to the sum of \$45,000; and dismissed as to the sum of \$15,000.

A. A. Stockton and C. A. Palmer for the appellants.

Weldon, Q. C., and *Barker, Q. C.*, for the respondents.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER I.

OF THE CONTRACT OF INSURANCE, HOW MADE,
WHEN PERFECTED, AND OF THE APPLICATION.

(Continued from page 159.)

In *Tough v. Provincial Insurance Co.*,¹ an interim receipt given in the country by an agent was cancelled from the Head Office by mail within the 30 days. A fire occurred before the arrival of the mail at the insured's residence. It was held by the Court of

¹ 17 L. C. Jurist.

Queen's Bench that the interim receipt was in force.¹

In *Browning v. Provincial Ins. Co.*, a certificate of insurance was got by one Joel Leduc, reading "said insurance to be subject to all the conditions in the policy of the company." The policies of the company read "A. B., as well in his own name as for and in the name of every other person to whom the same doth or may, or shall appertain in part or in all, doth make insurance," &c. Leduc insured so in Montreal flour that he was shipping to Newfoundland, property of Browning. The vessel on her way to Newfoundland was lost, and almost all the flour. Browning sued on the insurance that Leduc, his agent, had effected.² The certificate was held not to be the complete contract, but that reference to the policies usual was to be made, and might be made.³

In a case in the Queen's Bench, Upper Canada (A.D. 1858), *Goodfellow v. The Times and Beacon Ass. Co.*, the insured was given a provisional receipt in these words: "Received from Messrs. J. G. & Co., \$14 premium for an insurance of \$2,000, on property described in

¹ There was a conflict of opinion among the judges who took part in this case. There were two judges who dissented from the judgment of the Queen's Bench, and this judgment reversed the unanimous judgment of the Court of Review. So the opinion which prevailed was held by four judges only, while five were in favor of the Company, which was held liable.

A letter of acceptance mailed can't be recalled, but you can recall the private messenger, it was said in argument in *Household Fire, &c., v. Grant*. "The post office is treated as the agent of both parties," by Thesiger, L.J., in above case, and he approves *Taylor v. Merchants F. Ins. Co. Bramwell*, diss., seems to say the law ought to be the same as if we had no post,—sed? For we have a post.

In Scotland they used to hold acceptance not effectual till it reached its destination, and in a case in which an acceptance and an after refusal to accept reached the offeror at the same time, by an irregularity in the post office, acceptance was held neutralized. *Countess of Dunmore v. Alexander, Bell's Illustrations, Law of Scotland*, 1830, p. 86, vol. 1. That would not be held now in England, for acceptance mailed would be irrevocable.

² In England undisposed principal may sue on mercantile contracts made by his agent, subject to any defences which may exist against the agent. ? In Quebec province. See Hudon case.

³ Arnould, Vol. 1, p. 223 (3rd ed.) to the contrary notwithstanding.

the order of this date, subject to the approval of the board at Kingston; the said party to be considered insured for 21 days from the above date, within which time the determination of the board will be notified. If approved, a policy will be delivered; otherwise the amount of the receipt will be refunded less the premium for the time so insured. This was held not an absolute insurance for 21 days certain, but that the company might reject the risk within the 21 days at any time, and on notice the risk would end (one judge dissenting).

In *Fried v. Royal M. Co.*¹ a premium was taken by an agent in New York, conditioned that the policy should be issued from the Head Office at Liverpool, or the premium returned if the insurance were declined. The policy was sent from Liverpool to the New York agent. He retained it, yet the insurance was held good; the contract was held perfected though the policy was not had by the insured, save so; the company was condemned.

§ 23. Interim receipts operation.

Interim premium receipts may really operate insurances during the interim term unless the wording be special.²

A memorandum or receipt, such as mentioned above, means that the insurance is to be according to the terms of the policies ordinarily used by the insurer.³

§ 24. Negotiation for insurance by letter.

A question may arise as to the time at which the contract becomes complete when the negotiation for the insurance is carried on by letter. The doctrine that an offer to insure made by letter remains open till the letter is received by the other party, and that the offer cannot be retracted before that time, except personally or by letter so that the notice of the retraction may reach the party before he has dispatched a letter accepting the offer, is approved by many. The contract

¹ 47 Barbour, 127.

² See the two interim receipts in *Montreal Assurance Co. v. McGillivray*.

In England interim receipts must be upon stamped paper (not so in Quebec).

³ See observations of Aylwin, J., in case of *McGillivray*.

has been held to be completed as soon as the letter of acceptance is dispatched.¹ *Tayloe v. Merchants Fire Ins. Co.*,² seems to be an approved case.

Again, it has been held that it is not sufficient that the letter of acceptance should be merely written: it must be dispatched and beyond the control of the writer, and that within a reasonable time after the receipt of the offer, or, if any time is prescribed, within that time.³

§ 25. Revocation of acceptance.

Again says Phillips, Vol. 18 the letter of acceptance, after its despatch, may be countermanded or retracted, provided the notice to that effect reach the other party in advance of the letter. *Tayloe v. Merchants F. Ins. Co.*, cited by Phillips in support of this doctrine does not expressly sustain it. Certainly not. That was a case of insurance by correspondence (probably with a joint stock company unincorporated). The insurers made known their terms, the insured mailed a letter of acceptance (Dec. 21,) enclosing a check for the premium as he had been requested; the subject insured was burned (Dec. 22,) while the acceptance was being carried by mail. The Company was held liable. That case might better be cited to support the doctrine that as soon as the offer is accepted the contract is complete, and that despatch of a letter is such acceptance. But Phillips' doctrine is sound enough that the contract is, so, completed, "subject only to the contingency of the acceptor's revoking his acceptance before notice of it reaches the insurer."

Phillips' position is by Shaw (Shaw on Ellis) said to be supported by a dictum of Ch. Justice Parker in *McCulloch v. Eagle Ins. Co.* That case decided that where an offer has been made by a letter and accepted by another, there may be revocation of the offer before the acceptance reaches the offerer. The

plaintiff on the 29th of December, wrote asking upon what terms defendants would insure. On the 1st of January the defendants wrote their offer stating their terms. On the 2nd they wrote again, declining to insure. The plaintiff, on the 3rd, mailed his letter accepting the 1st of January offer (this was before he had received the letter of the 2nd). That was all the correspondence; no premium was paid. The subject insured (a vessel) was, three months afterwards, announced to have been lost. The plaintiff was non-suited.¹

If I mail at Montreal a letter to B at Toronto, agreeing to a proposal of his, I can revoke that acceptance by telegram before it reaches B.²

The decision in *McCulloch v. Eagle Ins. Co.* was held to be correct as to contracts by letters;³ but Kent and Duer do not concur in the opinion.

§ 26. The law on this point in France, and in the Province of Quebec.

Upon the question when a contract is perfected that is made by letter missive, there are differences of opinion; in Quebec as in France and elsewhere, the question is debated. Toullier, Pardessus and Troplong are of one opinion, Duranton and Marcadé of another, and Pothier, it is said, has not clearly expressed himself. Toullier, Vol. 6, note on p. 33, puts this case: On the 1st of January, I write from Rennes to a merchant in a distant town, proposing for merchandise at a certain price. On the 5th he answers that he accepts and will send the merchandise. His answer arrives at Rennes on the 8th; but on the 7th I had sent off a revocation of my offer. Toullier says this revocation is valid.

Troplong, Vente, No. 25, says that the consent of the writer of a letter containing an offer must be persevered in, not only until his letter reaches the person addressed, but until the moment of the acceptance by this

¹ *Adams v. Lindell*, 1 B. & Ald., highly approved by Kent, Vol. 2, p. 477, note. See also *Mactier v. Frith*, 6 Wend.

² 9 Howard. And see *Dunlop v. Higgins*, 12 English Jurist.

³ *Thayer v. Middlesex M. F. Ins. Co.*, 10 Pickering.

¹ 1 Pickering. *Brit. Am. Tel. Co. v. Coulson* L. R., 6 Exch. is of no authority, says Alb. L. J. Vol. 22, p. 424. Yet *McCulloch v. Eagle Ins. Co.* is like the decision in the *B. Am. Tel. Co.* case. Both Story and Parsons disapprove the *McCulloch* case, says the Albany L. J.

² 16 Journal du Palais, A. D. 1877.

³ 7 Am. Law Review, p. 453 (A. D. 1872-3)

person reaching the original offerer. He says that Pothier seems of a contrary opinion, exacting only persistence of the offerer until the time of the person addressed declaring acceptance of the offer. He adds that he thinks Pothier has fallen into an error, or has not fully stated his ideas.¹

Troplong puts this case; I write from Nancy to you at Lyons, proposing that you should buy my house for 40 000 francs. You answer from Lyons, on the 5th December, that you accept. On the 6th, before having received your letter, I write to you that I have changed my mind. We must decide, he says, that there is no sale. At No. 26, he says: Upon the same principle, the letter which you wrote accepting my offer did not bind or fix you, so long as that letter did not actually reach me. You were free to change your mind; you could retract by a letter, and this letter might arrive before the first, or at the same time.

Toullier, after stating the revocation to be valid in the case put by him, adds: But can it not be said that in making an offer by letter, the writer tacitly obliges himself not to revoke the offer before the return of the courier, or before the expiry of the time necessary for answer to him to reach? This would be most equitable, he says, and has been carried into the Prussian Code.

§ 27. *The law in Scotland.*

Bell, Principles of Law of Scotland, No. 78, says: "The acceptance completes the contract. The agreement is not suspended till the offerer has received notice of the acceptance; but this is under the qualification that there shall be no undue delay in notifying the acceptance."

§ 28. *Acceptance by letter revocable until it has reached the other party.*

The question is most interesting in other contracts of sale. I cannot see contract perfect without right acquired by each of the parties against the other. In the case put by Toullier, the merchant in the distant town had right, even after despatching the

letter of the 5th, to take or get it back on the 6th or the 7th, or to revoke it, before it reached me at Rennes, by another letter arriving at Rennes before it, or at the same time. If he did so, his original acceptance, even if I had never written my letter of the 7th, could not bind him; I could not claim fulfilment of the letter of the 5th.¹

Duorum in idem placitum consensus is true where two are present, one asking, the other answering, each binding himself; but the mere fact of there having been a point of time when the consent of both of two contracting parties, domiciled at distances from one another, existed together, ought to be held for naught where this consent was only in the mind of one, and unknown to the other. In the law of bills, it might be said that once the drawee had written acceptance upon a bill, though he had not spoken a word, nor delivered the bill accepted, there was contract perfected, the consent of the parties having met; yet we know that such an acceptance may be retracted, scored out, before delivery.²

Shaw says that the offer of one party and the acceptance of the other do not stand upon the same grounds; that the offer does not create a contract, and may be withdrawn if notice to that effect can reach the other party before he has done anything to indicate acceptance; but that as soon as the offer is accepted, (and a dispatch of a letter has been held such acceptance) the contract is completed and cannot be rescinded except by mutual consent. He cites 1 Duer, p. 130; *Brisban v. Boyd*, 4 Paige's Ch. R.³

It was held, *per* the Lord Chancellor, in *Dunlop v. Higgins*,⁴ that an offer by letter made by A to B, when accepted by B, makes a final contract, even before B's acceptance reaches A, provided it be mailed or sent off. B's posting his letter of acceptance is as much

¹ But if it be in the mail bag for me, Lord Bramwell would say, this bag was as my bag. The Post Office will not allow letters once mailed to be claimed back by despatcher.

² See further on the subject of offers, promises, acceptations and revocations, Grotius by Barbeyrac, liv. 2, c. 11.

³ Is not this the doctrine which *Dunlop v. Higgins*, (post) supports?

⁴ 12 (English) Jurist.

¹ Kent agrees with Pothier; 2 Kent Comm. 472.

as if he addressed the party present in words.¹

The language used at the place where the writer of the first letter lives will generally be regarded, not that of the place of the receipt and assent: though the contract is held concluded at the latter, says Savigny, by Guthrie, p. 196.

An example of contract by letter is to be found in *Harris' case*, L. R. 7 Chanc. A applies for shares in a company. The application is by letter, and an answer granting the shares, is posted by the company. Before receipt of this answer, A posts another letter recalling his application. Held, that the contract of allotment was complete from the moment the answer of the company was posted.

§ 29. *Tacit reconduction.*

Some policies agree to allow *tacit reconduction*, or renewal of the insurance, by new payments of premium on conditions, (e.g., on the company agreeing to accept the same) made before the expiration of the original term, or at a time fixed. In the absence of such an agreement fire insurers generally cannot be compelled to renew insurance.

In Canada, there is no usage under which days of grace are allowed, within which to pay premiums for renewals, or to continue a fire policy. In England, in the case of annual insurances, many offices allow fifteen days from the expiration of each year for the payment of the premium for the next year, and the insured is under protection of the policy until the expiration of the fifteen days, though after the happening of a fire. But under some policies, the insured, to have the benefit of insurance during the said fifteen days, must not only pay the premium, but the insurers must "agree to accept it."²

When an insurance exists, verbal contracts

of renewal by agents are generally held valid in the United States.

§ 30. *Premium falling due on Sunday.*

If a policy be for a term of years, the premium payable semi-annually, the premium falling due on a Sunday may be paid on the Monday following, and may be tendered accordingly, though the property insured has been lost by fire on the last Sunday.

In France the policies of most companies allow fifteen days of grace to pay renewal premiums in, and insurers cannot refuse to accept during the fifteen days.

§ 31. *Abandonment.*

Abandonment (*délaissement*) is not allowed in fire insurance; but there is nothing to prevent a stipulation that if things insured for, say £500, be damaged say 75 per cent., they may be abandoned, and the whole £500 be payable.¹

§ 32. *Some things the insured should look to.*

The policies of the companies doing business in Canada are generally favorable enough to the insured as regards the right of action that they confer, in the event of loss. They stipulate generally that the stock or funds of the company insuring shall be liable to make good to the insured all his loss, and they bind the company to the extent of its funds and capital to pay; so it is hardly necessary to advise the insured to see that the policy does clearly allow him a right of action at law against the company insuring or the parties executing the policy to such extent. In England the insured is advised to see that his right is not confined to a mere order for payment made by the subscribing directors upon the general body of the directors, or upon the company, to pay the loss, if loss should happen; as in *Alchorne v. Saville*,² where the policy read: "now we the trustees and directors of the said society whose names are subscribed, do order, direct, and appoint the directors for the time being of the said society to raise and

¹ The ruling in this case is very like that in *Taylor v. M. F. Ins. Co.*, 9 Howard. *Quære*, could A's letter not be revoked by telegram to B?

² See *Tarleton et al. v. Stanforth*, 1 Bos. & P. Article 2583 of the Civil Code of Lower Canada says, when by the terms of the policy a delay is given for the payment of the renewal premium, the insurance continues, and if a loss occur within the delay, the insurer is liable, deducting the amount of the premium due.

¹ See *post* (abandonment guarded against).

² 6 Moore.

"pay by and out of the monies and effects of the said contributionship;" and where the recourse of the insured was held to be only in equity, not action at law. Much more necessary is it in America to advise the insured to see to the character of the company with which he insures, its capital paid up, the conditions printed upon its policies, and its manner of dealing, usually, with sufferers after a fire. Companies that advertise largely cards of thanks, as from the insured to them, upon their paying their debts, ought to be avoided. I can never read such immoral "cards" without these words being recalled to my memory, from an old comedy :

hoc tempore,
Si quis quid reddit, magna habenda est gratia.

§ 33. *Particular stipulations of some English companies.*

An English policy declared that in case of loss the society would pay out of their funds, etc., and stipulated and declared that the subscribing three directors should not as members of the society be liable except under the articles of the society. The plaintiff stated that the funds of the association were adequate to pay. It was held that the defendants' declaration and stipulation were substantially a covenant by them to be responsible as far as the funds of the insurers would suffice, and the plaintiff obtained judgment at law.¹

§ 34. *Trivial conditions and important.*

Matters apparently insignificant are often of great importance. It is all very well to talk of things as trivial, but it is difficult to define what should fall within the category of small things, and what should not, observed Lord Penzance in the case of *Quebec Marine Ins. Co. v. Commercial Bank of Canada*.²

§ 35. *Defects in application sometimes not fatal.*

A policy required the application to set forth whether the property was incumbered, and to what amount; also, whether the in-

sured had estate less than fee, and its nature. The application was silent, and contained no question on this head; but a policy was issued. Held, that it was no defence to the action that the application was silent, and ought to have declared things.³

[To be continued.]

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, May 17.

Judicial Abandonments.

Michael Babcock, doing business under name of R. Millard & Co., railway supplies, Montreal, May 1.

Dame Elodie Côté, doing business under name of J. E. Dupuis, St. Henri, May 7.

Elzéar Hudon dit Beaulieu and Marie Delima Auger (E. Beaulieu & Co.), Windsor Mills, May 9.

Jean Baptiste Lafontaine, Chambord, lumber merchant, May 7.

Prosper Lafontaine, Lake Bouchette, lumber merchant, May 7.

Pierre Plourde, Fraserville, May 13.

Curators appointed.

Re Michael Babcock (R. Millard & Co.), Montreal.—A. F. Riddell, Montreal, curator, May 8.

Re Jean Baptiste Gézéux.—C. Labelle, Sorel, curator, May 13.

Re Arthur Laurent, Sherbrooke.—Kent & Turcotte, Montreal, joint curator, May 12.

Re Cléophas Martineau, St. Felix de Valois.—Kent & Turcotte, Montreal, joint curator, May 12.

Re P. Massicotte, St. Luc.—Kent & Turcotte, Montreal, joint curator, May 13.

Re J. P. Perrault, Ste. Anne la Pérade.—H. A. Bedard, Quebec, curator, May 13.

Re Phillips & O'Sullivan, plumbers, Quebec.—L. P. Robitaille, Quebec, curator, May 9.

Dividends.

Re Anselme Asselin, St. Joseph d'Alma.—First dividend, payable May 30, D. Arcand, Quebec, curator.

Re A. E. Désautels, trader, St. Pie.—First and final dividend, payable June 2, J. C. Désautels, N. P., St. Hyacinthe, curator.

Re Isaïe Fréchette, St. Hyacinthe, doing business as James Aird & Co.—Second dividend, payable June 3, J. Morin, St. Hyacinthe, curator.

Separation as to Property.

Marie Plessis dit Laferté vs. Hilaire Ricard, trader, St. Guillaume d'Upton, May 2.

Mathilda Millette vs. Gustave Bousquet, baker, Montreal, Aug. 3, 1899.

APPOINTMENTS.

Joseph E. Robidoux, to be Secretary and Registrar of the Province of Quebec, May 8.

J. R. Thibaudan, to be sheriff for the district of Montreal, in the place of P. J. O. Chauveau, deceased, May 9.

C. A. E. Gagnon, N. P., to be sheriff for the district of Quebec, in the place of Allyn & Paquet.

¹ *Andrews v. Ellison et al.*, 6 Moore.

² In the Privy Council, 1869.

³ *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lansing, 275; 5 Bennett, 361.

The Legal News.

VOL. XIII. MAY 31, 1890. No. 22

As was generally anticipated, the honour of knighthood has been conferred upon the Hon. F. G. Johnson, Chief Justice of the Superior Court for the province of Quebec; the fact being announced in the *London Times* of May 21. The fitness of the present distinction will be universally recognized. The Chief Justice has already sat upon the bench during nearly double the ordinary official term, and has rendered important public services in other capacities. Sir Francis Johnson is the third of three Chief Justices of the Superior Court, who have been knighted in succession,—the honour in the first case, however, being conferred after retirement from the bench. In future it will probably be considered to appertain to the position, as we observe that it is frequently bestowed on the Chief Justices of colonies of far less magnitude and importance.

The Supreme Court of the United States has affirmed the decision of the U. S. Circuit Court in *re Neagle*, 12 Leg. News, 349. The holding of the Court is as follows:—"Where reasonable ground existed for apprehension of deadly violence on the part of T. toward an associate justice of the United States on his way to hold a circuit in a State, and the attorney-general of the United States in consequence instructed the United States marshal of that district to take proper measures to protect his person, and the marshal deputed N. (a special deputy) to attend and guard him on his journey, and T. made a violent attack on the justice's person, at a railway station in that State, in the course of his journey to hold such court, and N., after warning T. to desist and notifying him that he was an officer, and T. not desisting, but being apparently about to repeat his attack or draw a weapon, N. shot and killed him, *held*, that the Federal Circuit Court had jurisdiction and authority to

discharge N. on *habeas corpus* from detention by the State authorities." The Chief Justice and Justice Lamar dissented, being of opinion that the Courts of the State of California (where the homicide occurred) had jurisdiction.

COUR SUPÉRIEURE (JOLIETTE).

15 avril 1890.

Coram DELORMIER, J.

LANDRY v. BEAUCHAMP.

Désistement—Art. 453, C. P. C.—Frais—Nouvelle action—Billet promissoire—Novation.

JUGÉ:—1o. *Que l'article 453 du C. P. C. en vertu duquel la partie qui s'est désisté d'une première action ne peut en instituer une deuxième contre le même défendeur et pour les mêmes motifs, sans avoir préalablement payé les frais encourus sur la première action, confère un privilège de droit strict que les tribunaux ne peuvent étendre aux autres cas non prévus, et entr'autres, à celui où la première action a été renvoyée sur défaut de procéder ;*

2o. *Que si un demandeur règle les frais sur une première action en payant partie de ces frais comptant et la balance par un billet promissaire endossé à trois mois de date, le défendeur poursuivi de nouveau par le même demandeur, avant l'expiration de ces trois mois, ne sera pas recevable à opposer une exception dilatoire basée sur le dit article 453 C. P. C., à moins d'alléguer quelque motif suffisant pour faire déchoir le demandeur du bénéfice du terme accordé, et de plus sans offrir de remettre les garanties acceptées ;*

3o. *Que le fait seul d'accepter un billet promissaire endossé n'a pas nécessairement pour effet d'opérer novation de l'ancienne créance, vu que la novation ne se présume pas.*

PER CURIAM:—Il s'agit du mérite de deux exceptions dilatoires produites par le défendeur sous les circonstances suivantes: Le 25 juillet dernier, 1889, le demandeur poursuivit le défendeur par action, devant cette Cour, portant les Nos. 1890, 1891; la première était une action en résiliation d'acte, et la deuxième une action en dommages pour fausse arrestation; les allégations étaient les mêmes que celles contenues dans les deux causes main-

tenant soumises. Ces deux actions furent renvoyées le 10 janvier dernier, le demandeur ayant fait défaut de comparaître à l'audition. Les frais en faveur des procureurs du défendeur sur le renvoi de ces actions furent taxés dans la première cause à la somme de \$68.50, et dans la deuxième à celle de \$71.85. Le 23 janvier dernier, le demandeur institua les deux actions présentes, pour les mêmes causes, et elles furent signifiées au défendeur le 25 du même mois. Deux jours plus tard, le 27 janvier dernier, les procureurs du défendeur firent émaner deux exécutions contre les biens du demandeur pour le recouvrement du montant de leurs frais ci-dessus mentionnés. Le même jour le demandeur se rendit au bureau des procureurs du défendeur et là et alors régla ces frais, plus ceux occasionnés par l'émanation des saisies et aussi les intérêts de la manière suivante : il paya comptant la somme de \$80 et donna son billet à 2 mois endossé par un M. Elzéar Rivet pour la balance.

Lorsque les deux nouvelles actions du demandeur furent rapportées, le défendeur comparut et produisit les exceptions dilatoires maintenant soumises, dans lesquelles il allègue : que le demandeur ne peut être reçu à procéder sur ces actions attendu qu'il n'a pas encore payé les frais encourus sur le renvoi des deux premières actions. Le demandeur conteste ces exceptions et prétend qu'elles sont mal fondées, que les procureurs du défendeur ayant accordé terme au demandeur celui-ci ne leur doit rien, et qu'il y a eu novation de la dette. Il s'agit de déterminer le mérite de ces deux exceptions dilatoires.

Le défendeur appuie ses prétentions sur l'art. 453 du C. P. C. Cet article est relatif au désistement, et il déclare que la partie qui s'est désistée ne peut recommencer avant d'avoir préalablement payé les frais encourus par la partie adverse sur la demande ou procédure abandonnée. Comme on le voit cet article se rapporte au désistement volontaire que fait un demandeur, tandis que dans le cas actuel, il s'agit d'un renvoi d'action pour défaut de comparaître à l'audition. Je n'ignore pas qu'il existe des jugements qui ont étendu les dispositions de cet article au cas du renvoi d'une première action, mais je ne puis concourir dans cette opinion. Il s'agit ici d'un

droit strict, d'un privilège accordé par la législature dans un cas exceptionnel ; or il est de principe que les privilèges sont de droit strict et ne s'étendent point au-delà des exceptions créées par la loi ; le législateur a cru devoir créer une cause de privilège exceptionnel en imposant une espèce de pénalité au plaideur téméraire qui, après avoir institué une première action s'en désiste *volontairement* en l'astreignant à payer les frais de cette première poursuite avant de pouvoir en recommencer une deuxième, mais il n'a pas jugé à propos d'établir formellement que le demandeur, dont la première demande est renvoyée pour toute autre cause que sur désistement, sera tenu de payer les frais de sa première poursuite avant de pouvoir recommencer. Le législateur n'ayant point établi ce privilège les tribunaux ne peuvent y suppléer.

Mais quoiqu'il en soit de cette question controversée, le second moyen invoqué par le demandeur est d'ailleurs suffisant pour justifier le renvoi de ces exceptions. Le demandeur a réglé avec les procureurs du défendeur alors que ceux-ci n'avaient pas encore l'opportunité de produire aucune exception dilatoire. Il leur a payé plus de la moitié de leurs deux mémoires et leur a donné un billet endossé à 2 mois qui n'était pas encore échu lors de la production des exceptions dilatoires. Comme principe général il est vrai de dire que le fait de prendre un billet promissoire, même endossé par un tiers, ne crée pas une novation de la dette originaire, à moins que la novation ne soit stipulée par la *décharge* de l'ancien débiteur — car la novation ne se présume pas, ¹ mais il est également vrai en droit que le débiteur qui a terme ne doit rien (art. 1090 C. C.) et qu'il ne peut être déchu du bénéfice du terme que pour les causes reconnues par la loi (art. 1092 C. C.) Or, dans le cas actuel, le défendeur n'allègue aucune fraude, aucune déconfiture, soit du débiteur, soit de l'endosseur, et n'offre même pas de remettre le billet en question. Il y a donc ici, sinon novation, du moins une convention suffisante pour ne point priver le demandeur du délai accordé, et des conséquences légitimes qui en résultent.

¹ (Art. 1171 C. C., Pothier, Oblig., No. 594—C. N. 1273—28 Demolombe, 236.)

tent.¹ Les exceptions dilatoires doivent donc être renvoyées.

Voici le jugement de la Cour Supérieure :

"La Cour ayant entendu les parties par leurs conseils respectifs sur le mérite de l'exception dilatoire produite en cette cause, examiné la procédure, les documents et admissions au dossier et sur le tout délibéré :

"Considérant que le défendeur, par l'exception dilatoire par lui produite, demande à ce que les procédures en cette cause soient suspendues jusqu'au paiement, par le demandeur, de la balance des frais taxés en faveur des procureurs du défendeur dans une cause portant le No. 1890 des dossiers de cette Cour dans laquelle le présent demandeur poursuivait le présent défendeur pour les mêmes motifs que ceux invoqués en la présente action ;

"Considérant que le défendeur n'allègue pas en la dite exception dilatoire que l'action antérieure, instituée sous le susdit No. 1890, a été renvoyée, le 10 janvier dernier, sur le motif que le demandeur se serait volontairement désisté de telle action ;

"Considérant que l'article 453 du Code de Procédure Civile est relatif au cas seulement où un demandeur se désiste volontairement d'une première action, et que le privilège, conféré par cet article, d'exiger le paiement des frais encourus sur la première action, avant de permettre la continuation sur une deuxième action, est un privilège de droit strict que les tribunaux ne peuvent étendre aux autres cas non prévus, et entre autres à celui où la première action est renvoyée sur défaut de procéder ;

"Considérant de plus que le 27 janvier dernier, avant que les procureurs du défendeur aient eu le droit de produire aucune exception dilatoire, le demandeur a, de bonne foi, réglé le montant des frais dus aux dits procureurs du défendeur en la susdite cause No. 1890, en leur en payant une partie considé-

rable comptant, et la balance par un billet promissoire endossé payable à deux mois de cette date ;

"Considérant que le défendeur n'offre point par sa dite exception de remettre le dit billet, qui n'était pas échu lors de la production de la dite exception, et n'allègue aucun motif de fraude ni de déconfiture de nature à faire perdre au demandeur le bénéfice du terme stipulé au dit billet ;

"Considérant que bien que le fait seul d'accepter un billet promissoire, même endossé, n'opère pas, de plein droit, une novation de l'ancienne créance, à moins de convention expresse, vu que la novation ne se présume pas, néanmoins, il résulte de tel fait une obligation réciproque quant au délai accordé, et le créancier ne peut seul annuler telle obligation sans causes légales suffisantes, et sans offrir la remise des garanties acceptées ;

"Considérant que la dite exception dilatoire est mal fondée,

"La Cour renvoie l'exception dilatoire du défendeur avec dépens contre le défendeur, distracts, etc."

Dugas & Marsolais, avocats du demandeur.

McConville & Renaud, avocats du défendeur.
(J. J. B.)

COURT OF QUEEN'S BENCH—MONTREAL.*

Libel—Dismissal of public official—Publication of fact by newspaper with explanation of cause of dismissal—Pleading truth of statement.

Held:—(Reversing the decision of MATHIEU, J., 4 S. C. 49), that the acts of every public official are subject to fair and legitimate criticism by the press and the general public; that the dismissal of a public official is a matter of general interest of which the public are entitled to be informed; and the announcement of such dismissal and of the cause thereof is not ground for an action of damages, except in cases where it appears that the publication was made maliciously and with intention to injure. It is for the Court, or for the jury (if the case be tried before a

¹ La Cour est disposée à appliquer ici la doctrine reconnue dans *Byles*, on bills, ch. 16, p. 240: If a bill or note be taken on account of a debt and nothing be said at the time, the legal effect of the transaction is this: that the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor. *Byles* cite plusieurs autorités anglaises dans ce sens.

* To appear in *Montreal Law Reports*, 5 Q.B.

jury), to determine, on the evidence, whether the publication complained of was made maliciously and with intention to injure, and the truth or untruth of the facts is one of the most important circumstances to be considered in arriving at a decision on this point; therefore a plea alleging the truth of the publication is not demurrable.—*Graham & Daoust*, Dorion, Ch. J., Tessier, Cross, Church, JJ., June 20, 1888.

Libel—Compensation—Plea—Notoriety of imputations.

Held:—1. A defendant sued in damages for libel, cannot plead compensation by damages suffered by him from calumnious attacks made upon him by the plaintiff.

2. (DORION, Ch. J., *diss.*) The notoriety of the facts contained in the publication complained of, may be pleaded in mitigation of damages.—*Trudel & Viau*, Dorion, Ch. J., Tessier, Church, Bossé, Doherty, JJ., March 27, 1889.

Libel—Plea of justification—Truth of matter charged as libel—Compensation of wrongs.

Held:—(Affirming the judgment of JOHN-SON, Ch. J., 5 S. C. 297), 1. That in an action of damages for the publication of a libel the defendant may plead the truth of the matter charged as libel, more especially where (as in this case) he alleges that the publication was made in the interest of the public, and concerning matters of public import.

2. The defendant may oppose to a demand of damages for libel or slander, the fact that the plaintiff on his part libelled the defendant, and that there is compensation *d'injures*, where the attack and defence are alleged to have been simultaneous, as in a discussion between the editors of two newspapers in the columns of their respective journals.—*Trudel v. Cie. d'Imprimerie etc.*, Dorion, Ch. J., Tessier, Church, Bossé, Doherty, JJ., March 27, 1889.

Libel—Pleading truth of matter charged as libellous.

Held:—(Following *Graham & McLeish*, M.L.R., 5 Q.B. 475, and *Trudel & Viau*, M.L.R.,

5 Q.B. 502), that in an action of damages for malicious libel, the truth of the alleged libel may be pleaded in justification, or in mitigation of damages.—*Leduc v. Graham*, Dorion, Ch. J., Cross, Baby, Church, Bossé, JJ. (Dorion, Ch. J. and Bossé, J., *diss.*), June 28, 1889.

*SUPERIOR COURT—MONTREAL.**

Jurisdiction—Promissory note—Place where dated.

Held:—That an action may be brought in the district of Montreal, for the recovery of the amount of a promissory note dated at Montreal, but which was in fact signed in the district of Ottawa where the promisor has his domicile. The promisor, in dating the note at Montreal, makes as it were an election of domicile at Montreal, and consents that the action for the recovery of the note be brought there.—*Banque du Peuple v. Prevost*, deLorimier, J., Feb. 8, 1890.

Promissory note—Given to creditor to induce him to sign agreement of composition—Illegal consideration.

Held:—That a promissory note given by an insolvent to a creditor to induce the creditor to sign an agreement of composition, is null and void; and no action can be maintained thereon by a person to whom the note is transferred after maturity.—*Gervais v. Dubé*, Würtele, J., March 13, 1890.

Attachment before judgment—Affidavit—Sufficiency of allegations—Art. 834, C. C. P.

Held:—1. The allegation, in an affidavit for simple attachment, of an intention on the part of the defendant "to defraud his creditors or the plaintiff in particular," and the allegation that the plaintiff will "sustain damage or lose his debt," are not uncertain or incompatible.

2. The allegation that the defendant "is secreting or is about to secrete his property," is uncertain and incompatible, and therefore insufficient to justify the issue of a writ of simple attachment.

* To appear in Montreal Law Reports, 6 S. C.

3. The allegation "that the defendant absconds" is sufficient to justify the issue of a writ of attachment.—*McGowan v. Guay*, Würtels, J., April 17, 1890.

*Composition sur félonie—Contrat—Nullité—
Dation en paiement pour éviter l'arrestation.*

B., commis chez G. frères, détourna à ses patrons la somme de \$275. Menacé de poursuites au criminel, il leur remit certains effets mobiliers et G. frères, en considération de ce règlement, s'engagèrent de ne point faire arrêter leur commis infidèle.

Jugé:—Que malgré le règlement de la félonie commise par B., ce contrat était valide et a eu pour effet de conférer à G. frères la propriété de ces effets.—*Paquette v. Bruneau*, en révision, Taschereau, Mathieu, Loranger, JJ., 30 juin 1888.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

[Continued from p. 168.]

CHAPTER II.

OF THE ESSENCE OF THE CONTRACT, ITS TERM,
AND THE PREMIUM.

§ 36. Subject insured.

It is of the essence of the contract that there be one or more things the subject of it, and insured; but insurance may be made to cover subsequent acquisitions or future interests. Goods may be insured even before they are purchased. There are policies known as floating policies. These are granted to commission merchants or agents, and are made applicable to all goods that, during a time fixed, may be in their possession.

Casaregis, Disc. 7, No. 17, says insurance is valid on goods in a place or ship, though the insurer only acquire an interest afterwards. But insurance on goods in a place will not cover goods which the insurer neither then owned nor had in the place, but which only afterwards were put into the place. The distinction is not clear.

Policies may be granted to cover goods of the insured, or with him in trust, during a

time fixed, in any building within the limits of a named city or parish, or on any wharf, or in any warehouse within a distance fixed from any point, as, for instance, within five miles of the general post office.

§ 37. The term of the insurance.

Insurance companies acknowledging the receipt of the premium usually covenant that from one time named to another they will be liable to make good any loss or damage that may happen by fire to the property insured, subject, of course, to the exceptions and conditions stated in the policy.

§ 38. The computation of time.

In the computation of time from an act done, the day on which the act is done is to be computed in the reckoning. Thus, notice of action being given, the month begins on and with the day of notice given.¹ Where an arbitrator enlarges the time for an award till a given day, he may make it on that day.²

§ 39. When the risk begins, and when it ends.

In *Isaacs v. Royal Insurance Company*³ it was held that where the term was from 14th February to 14th August, 1868, the 14th August was covered; and therefore, when a fire occurred on the night of the 14th August, the insured could recover.

Quære, was the insured *not* covered on the 14th February?⁴

It would be well for companies to make their policies read from 12 noon to 12 noon. Had this been so in the case above mentioned, one argument of the judges, viz., that the insured had not any period of the 14th August to renew on if the pretension of the Royal Insurance Company were admitted, would be without weight.

¹ *Cattle v. Burditt et al.*, 3 Durnf. & East, 623.

² *Kerr v. Jenson*, 1 N. Y. Leg. Observer, A. D. 1843. In *Pugh v. Duke of Leeds*, Cowp. 714, a lease from the day of the date was held inclusive, and the court said it might be taken to be either inclusive or exclusive according to the subject matter.

³ Law Rep. Exch. A. D. 1870.

⁴ Suppose A to become surety to B for all monies advanced during six months from the date of the deed: is he liable for advances on the day of the deed?

⁴ Kent, 95, n.

The English condition common in Canada provides that payments to renew policies must be made on or before the commencement of each and every succeeding year, otherwise such insurance will expire.¹

§ 40. *The application for insurance.*

The application, or proposal for insurance, forms part of the contract, if there be reference to it in, or if it be annexed to, the policy and delivered with it; or if both be together on the same sheet of paper. In such cases warranties may often be gathered from the application.²

Proposals not referred to in the policy amount to representations only.³

In Canada, fire insurance, generally, is annual, but it may be for a longer or shorter time. A condition may make it terminable at any time after a notice to the insured. But usually it is stated that the premium must be paid at a time fixed, and so *dies interpellat pro homine*.

§ 41. *The period of the insurance.*

The risk generally commences from the date of payment of the premium and the granting of the policy or interim receipt, but it may be stipulated to commence at a subsequent time, or to have effect between two particular dates. Some French companies make their policies have force only from noon of the day next after day of date of policy.

If the insurance be upon goods that may be in a place between two dates mentioned, the days of those dates are not included. Where a policy states that the insurance is from one 24th of December to the 24th of December following, the first 24th of December is not

included, though the premium may have been paid on that day.

The risk ends with the term for which it was made. If a fire commence in insured buildings before the expiration of the term of insurance, and continue till after expiry of it, the insurers are liable, says Boudousquie. (This applies to France.) But to what extent? Apparently only to the extent of the damage done during the subsistence of the policy. In marine insurance, though the ship receive her death wound during the term of a policy, if she be kept afloat beyond the period of insurance, the risk is ended before the loss, and the insurers are not liable.

§ 42. *Days of grace for renewal of insurance.*

In England, the protection of the policy expires with the day mentioned in the policy, subject nevertheless, when the insurance is renewable, to certain days of grace, usually fifteen, conceded by the office for payment of renewal premium, during which the assured is secure though fire happen and his premium be only paid later during these fifteen days.¹ Some policies, in England, appoint all this. But the policy or its conditions may read or stipulate to the very contrary. In the case of *Tarleton v. Staniforth*,² the policy allowed the fifteen days for payment of renewal premium, but provided the managers accepted the same. The loss happened in the fifteen days, and as the premium had not been paid, the company got free. The premium in this case was tendered after the fire and within the fifteen days, but the managers refused to accept it.

In Quebec, in the case of an insurance for a year, the company insuring need not continue a second year, and unless they agree to do so they are free.

In England, and probably in Quebec, public advertisements by the offices have been held sufficient to entitle the insured to days of grace, though the policy be silent on the point.

The Cour de Cassation, in August, 1873, held that though there was a stipulation for

¹ Condition of Liverpool and London Insurance Co.

² See Warranties, *post*.

³ 5 Hill.

Quere, may not the application be held no part of the policy, often, in absence of condition? If there be doubt, it is not to be treated as a warranty, says Flanders, p. 249. Mere reference to the application is nothing to oblige us to hold it warranty, he says, p. 233; *aliter*, if referred to as part of the policy. So a survey may be made part of the policy. Phillips says that all representations false in things material, before the policy leading to it (even though only parol), vitiate the policy.

¹ See Bunyon on Fire Insurance (Edn. of 1867).

² 5 T. R.

punctual payment of premiums without the necessity of any putting in default,¹ yet the insured might recover because the insurance company had not put him in default (*en demeure*) to pay; and this, too, although the premiums were expressly stipulated to be payable at the company's office (*portables*). This decision, which seems to be going far, confirmed a judgment to the same effect of the Cour d'Appel of Lyons of 31st July, 1872.

If a man, after the expiration of the year, has fifteen days to renew the insurance, and during the fifteen days the premium be refused because the company has raised its rates, and a fire happen within the fifteen days, the company is not liable.²

§ 43. *Effect of acknowledgment of payment of premium though not actually paid.*

In *Prince of Wales Assurance Co. v. Harding*,³ a case of one insurance company re-assuring with another, premiums were held paid by one giving receipts for them to the other, though not actually paid. In this case it appeared that periodical settlements were the usage between the two companies.

Bunyon, p. 83, says that insurance offices may agree to give credit to the insured for premiums, and hand him receipt, and where such credit is given it is equivalent to payment. This must, however, be taken to be subject to the proviso that the Act of incorporation does not prohibit such a proceeding.⁴

§ 44. *Granting delay for payment of premium.*

The premium is generally paid at once on the granting of the policy, but it may be

¹ "Sans qu'il soit besoin d'aucune mise en demeure."

² See *Salvin v. James*, 6 East.

³ 1 El. Bl. & El. 183.

⁴ In the absence of fraud, the policy statement concludes as to premium paid. Smith, Mercantile Law, p. 357 (8th Ed.). So the plaintiff need only wait, and prove the contrary of fraud after defendant's proofs to fraud. In *La Comp. d'Assurance des Cultivateurs & Grassein*, 24 L. C. Jurist, the insurance company took the insured's note for the premium, payment whereof was acknowledged, and policy delivered. The insured failed to pay the note at maturity. Held, that the insurance not the less attached. The policy was held to admit a *paiement effectif* to the satisfaction of the insurers. Judgment went in favor of the insured less the amount of the note, and this was confirmed by the Queen's Bench at Montreal, (Dec., 1879) the five judges being unanimous.

made payable at a future time, or by instalments; except where a public law, or incorporating Act, orders otherwise.

§ 45. *Agent debiting himself towards his company for the premium.*

It sometimes happens that where the premium ought to be paid in cash, the policy is delivered by an agent upon an agreement that there shall be a delay of a few days, or weeks, for the payment of the cash; and sometimes a check or note is taken instead of cash. Such practices tend to trouble, particularly where fire happens before the agent has been paid by the insured. It sometimes appears in such cases that the agent has debited himself towards his principals; sometimes, however, it is the other way.

[To be continued.]

APPEAL REGISTER—MONTREAL.

Friday, May 16.

De Chantal & Plamondon.—Acte granted of *désistement* from the appeal.

Ex parte A. B. Coullée.—Petition to be appointed a bailiff of the Court granted.

Montreal Loan and Mortgage Co. & Leclaire.—Heard. C. A. V.

Canadian Pacific R. Co. & Robinson.—Part heard.

Saturday, May 17.

Canadian Pacific R. Co. & Robinson.—Hearing concluded. C. A. V.

Crauford & Protestant Hospital for the Insane.—Application for precedence rejected.

Hagar & Seath.—Part heard.

Monday, May 19.

Hamilton & Lumb.—Leave to appeal from interlocutory judgment granted.

Hagar & Seath.—Hearing concluded. C. A. V.

Bonneau & Circé.—Submitted on facts. C. A. V.

Dominion Oil Cloth Co. & Coallier.—Heard. C. A. V.

Bergevin & Taschereau, & Masson.—Part heard.

Tuesday, May 20.

McBean & Blackford.—Motion for leave to appeal from interlocutory judgment. C. A. V.

Bergevin & Masson.—Hearing concluded.
C. A. V.

Palliser & Lindsay.—Heard. C. A. V.

Wilson & Lacoste.—Heard. C. A. V.

Moodie & Jones.—Part heard.

Wednesday, May 21.

Fournier & Leger.—Judgment affirmed.

Desvoyaux, Laframboise & Tarte Larivière.—Modified; costs of appeal against respondent.

Bergeron & Leblanc; Bergeron & Dufresne.—Affirmed.

Larivée & Société C. F. de Construction.—Reversed.

Foster & Fraser.—Affirmed.

MacManamy & City of Sherbrooke.—Reformed; costs of appeal against respondent.

Corporation of Ste. Geneviève & Boileau.—Affirmed.

Moodie & Jones.—Hearing concluded.
C. A. V.

McFarlane & Fitt.—Part heard.

Thursday, May 22.

Walker & Guardian Fire & Life Ins. Co.—Motion for leave to appeal from interlocutory judgment. C. A. V.

Molson Bank & Hibbard, & Brush.—Motion for leave to appeal from interlocutory judgment. C. A. V.

McFarlane & Fitt.—Hearing concluded.
C. A. V.

Sherbrooke Telephone Co. & City of Sherbrooke.—Heard. C. A. V.

Michon & Leduc, & Bousquet.—Heard.
C. A. V.

Friday, May 23.

McBean & Blackford.—Leave to appeal from interlocutory judgment granted.

Molson Bank & Hibbard.—Motion for leave to appeal from interlocutory judgment rejected.

Walker & Guardian Fire & Life Ins. Co.—Motion for leave to appeal from interlocutory judgment rejected.

Commissaires d'Ecole de Ste. Victoire & Hus.—Reversed, Church and Bossé, JJ., dissenting.

Commissaires d'Ecole de St. Marc & Langevin.—Reversed, each party paying his own costs, Tessier and Church, JJ., dissenting.

Exchange Bank & Fletcher.—Confirmed, Dorion, C.J., and Church, J., dissenting.

Barnard & Molson.—Reformed, each party paying his own costs, Dorion, C. J., and Church, J., dissenting.

Royal Institution & Scottish Union, & Barrington.—Confirmed.

Archambault & Bourgeois.—Confirmed.

Connolly & Bedard.—Confirmed, Doherty, J., dissenting.

Corporation de Chambly & Lamoureux.—Confirmed.

Roy, fils & Girard.—Reversed, each party paying his own costs in both Courts.

Grogan & Dolan.—Confirmed.

Canadian Pacific R. Co. & Charbonneau.—Reversed.

Hannan & Ross.—Reversed and action dismissed; Tessier and Bossé, JJ., dissenting.

Irring & Chapleau.—Reversed.

Morin v. The Queen.—Application on the part of the Crown, to have the return to the writ of error issued in the Court of Queen's Bench sitting at Quebec, transferred to the same Court sitting at Montreal. C. A. V.

Monday, May 26.

Morin v. The Queen.—Application rejected.

Schiller & Schiller.—Leave to appeal from interlocutory judgment refused.

Gareau & Blackwell.—Motion for leave to appeal from interlocutory judgment. C. A. V.

Great North Western Telegraph Co. & Montreal Telegraph Co.—Part heard.

Tuesday, May 27.

Gareau & Blackwell.—Motion for leave to appeal from interlocutory judgment rejected; Cross, J., dissenting.

Evans & Galt et al.—Appeal dismissed; no proceeding for a year.

Glasgow & London Ins. Co. & Canadian Pacific R. Co.—Do.

Lionais & Frechette.—Do.

Cie. de chemin de fer de Jonction de Beauharnois & Brodeur.—Do.

Archambault & Lalonde.—Do.

Ex parte C. T. Jetté.—Petition to be admitted a bailiff granted.

Labrecque & Letang.—Appeal dismissed.

Ex parte Desormeaux.—Petition to be admitted a bailiff granted.

Great N. W. Telegraph Co. & Montreal Telegraph Co.—Hearing concluded. C. A. V.

The Court adjourned to June 19 for judgments.

The Legal News.

VOL. XIII. JUNE 7, 1890. No. 23.

In these degenerate days it would appear that even the barrister's fee is not held sacred, and that there are attorneys unscrupulous enough to appropriate to themselves the *honorarium* pertaining to counsel. The following significant paragraph appears in the report of the English Bar Committee:—"The committee have carefully considered whether it is desirable and feasible to establish an 'Information Book' as to solicitors who neglect to pay counsels' fees. They have come to the conclusion that, however desirable it may be, it is not feasible, having regard to the large number of barristers practising at the bar; the difficulty of insuring that the entries which might be made in such a book would be of a proper character is very considerable; while, if the right to make entries was limited to subscribers to the Bar Committee, a new principle would be involved of the Bar Committee acting for the benefit of subscribers only, and not of the whole bar, and this the committee do not consider desirable."

The *Green Bag*, having exhausted the law schools, now begins a raid upon appellate tribunals, and in the June number, giving the place of honour to Canada, presents a series of portraits of gentlemen who are introduced as the judges of the Supreme Court. If, as some distinguished novelist opines, every exertion of the intellect imprints an additional trait of ugliness upon the features, we might expect to find the portraits of men doomed to labours so severe as those imposed on judges, characterized by stern severity rather than comeliness. The artist, however, does not exhibit these gentlemen at a disadvantage in the latter respect, as they make upon the whole rather a handsome and dignified group of portraits. Mr. Justice Gwynne, in particular, appears as a gentleman of singularly refined and pleasing expression, notwithstanding twenty years of judicial life.

Novelists are fond of dipping into law, usually with disastrous results as far as accuracy is concerned; but the point raised in a recent production is extravagant enough to deserve mention. In the marriage ceremony of the Church of England the bridegroom declares, "With all my worldly goods I thee endow, in the name of the Father, and of the Son, and of the Holy Ghost, Amen." It is suggested that if this is not a lie, the husband has no power afterwards to dispose of the property without his spouse's consent. And if this covenant is a nullity, then the marriage ceremony is a delusion, the woman is not married, the children are illegitimate, and a great many estates in England are held by questionable titles!

SUPERIOR COURT.

AYLMER, April 21, 1890.

Coram MALHOT, J.

LAWLESS *es qual.* v. MAUD MARY CHAMBERLIN.

Emancipated Minor—Curator—Extent of powers—Parties to action.

Held:—1. *That a curator to an emancipated minor cannot in legal proceedings represent the minor, but that the latter must himself be impleaded in his own name, assisted by his curator.*

2. *That in an action by a father to annul the marriage of his minor son for want of the paternal consent, the father cannot appear as curator to his son, who must be impleaded personally, assisted by a curator ad hoc.*

The present action is brought by John P. Lawless, personally, and in his capacity of curator to his minor son, Sidney Cusack Lawless, to annul the marriage of the latter to the defendant, on the ground that the marriage took place without his, the father's, consent. He alleges that at the time of the marriage the said Sidney Cusack Lawless resided with him in the city of Hull, in the Province of Quebec, and that immediately thereafter he returned to the plaintiff's domicile, where he has ever since lived, and that the parties to the said marriage left the Province of Quebec for the sole purpose of being married in the Province of Ontario,

after divers persons duly qualified to perform the ceremony in the former province had refused to marry them; and for the purpose of evading the law. That the said celebration was effected without the knowledge or consent of the plaintiff, but contrary to his desire and in a clandestine manner, and that the plaintiff has never in any way approved of the marriage, but has repudiated and now repudiates the same.

He further avers that he has impleaded the said Sidney Cusack Lawless by his curator for the purpose of having said minor hear the judgment to be rendered herein, and prays that the said marriage be declared to be null and void, and be annulled and set aside, and the parties thereto declared never to have been lawfully married.

The defendant met the action by a demurrer in which she urged the illegality and insufficiency of the writ and declaration:

1. Because in and by the said declaration it is alleged that the said Sidney Cusack Lawless and the said defendant are man and wife;

2. Because the courts of the province have no power or jurisdiction to annul said marriage;

3. Because the only power or authority to annul the said marriage in the Dominion of Canada and Province of Quebec is the Parliament of Canada;

4. Because the said Sidney Cusack Lawless and the said defendant have not been properly impleaded in this action;

5. Because it does not appear that the said Sidney Cusack Lawless has had any notice of this action, and is not a party thereto;

6. Because the said plaintiff, John P. Lawless, in seeking to set aside the present marriage on a ground purely personal to himself—to wit, that his own consent thereto had not been given—should have caused the said Sidney Cusack Lawless, who, as appears by said writ and declaration, is still a minor, to be assisted by a tutor or curator *ad hoc*, and by some person other than himself;

7. Because, as appears by said writ and declaration, the said defendant is a married woman, and her said husband should have

been put into the present action for the purpose of authorizing her.

Subsequently to the marriage and previously to plaintiff's appointment as curator to his son, the plaintiff caused a family council to be held, and the emancipation of his son to be granted. The Court stated that this was entirely unnecessary, as the minor was already emancipated by the mere fact of the marriage, which, so long as it was not set aside, was existing with all its legal consequences. His son, though still a minor, was emancipated and could not be represented before the Court by a curator. An emancipated minor must plead or be impleaded personally before the Court. The status of the curator is only to the extent of assisting him, and not to that of representing him or acting for him. Moreover, in the present instance, the plaintiff, John Patrick Lawless, could not act as curator to his son, for his interests in the case appeared to be antagonistic to those of his son. A special curator or curator *ad hoc* ought to have been appointed to the emancipated son to assist him in this case.

The following is the judgment of the Court:—

"The Court having heard the parties by their advocates on the *défense en droit* contained in the pleadings, and firstly pleaded by the defendant, and having maturely deliberated;

"Considering that the action has been taken by John Patrick Lawless, as well in his own name as in his quality of curator to his emancipated minor son, Sidney Cusack Lawless, to annul the marriage of the said Sidney Cusack Lawless, celebrated at Ottawa on the 1st day of August last, on the ground that the said marriage was contracted clandestinely and without his consent;

"Considering that the said John Patrick Lawless, the plaintiff, has not the right in his quality of curator to appear for his emancipated son, but that his said son being emancipated by reason of his marriage can only appear personally, by himself and in his proper name, although assisted in certain cases by his curator;

"Considering that the said Sidney Cusack

Lawless is not personally in this cause nor validly represented herein;

"Considering that it was necessary to put him into the action in order to pronounce the nullity of his marriage with the said defendant, and also to permit him to assist his said wife if he so judged fit;

"Considering that the plaintiff by his action in this cause demanding the nullity of the marriage of the said Sidney Cusack Lawless, for reasons which are personal to himself, cannot validly represent nor assist in this case the said Sidney Cusack Lawless as his curator, but that he ought to have named a curator *ad hoc* for that purpose;

"Considering that the defendant is well founded to complain that the said Sidney Cusack Lawless has not been impleaded in this case;

"Considering finally that that part of the plea of the said defendant in the first place pleaded, by which she invokes the above ground, is well founded, and that the action in this cause, as instituted, is badly brought;

"And considering that the other part of said plea in which she declines the jurisdiction of said Court is unfounded; rejects this last part of the said plea, without costs, maintains the remainder of said plea, and in consequence dismisses the action of the said plaintiff with costs, of which distraction, etc."

Action dismissed.

T. P. Foran, for plaintiff.

Brooke & McConnell, for defendant.

(C. J. B.)

DECISIONS AT QUEBEC.*

Femme—Communauté.

Jugé:—Que la séparation de corps pour adultère de la femme ne lui fait pas perdre sa part dans la communauté de biens.—*Drolet & Lapierre*, en appel, Dorion, C.J., Tessier, Cross, Church, Bossé, J.J., 6 déc., 1889.

Partnership—Share of partner—Attachment by garnishment.

Held:—Partnerships, whether civil or commercial, are juridical entities distinct from the individual members who compose them.

Creditors of the partners can therefore seize the share of the latter only in the hands of the partnership, and not in those of its debtors.—*Babineau v. Théroux*, in Review, Routhier, Caron, Andrews, J.J., Nov. 28, 1889.

Règlement municipal—Violation de contrat—Taxe oppressive—Maire et pro-maire.

Jugé:—1. Les corps municipaux ne peuvent violer les contrats auxquels ils sont parties par les règlements qu'ils adoptent, et un règlement imposant une taxe qui a un tel effet est nul;

2. Le maire de Québec forme une partie intégrante du conseil de ville de cette cité. Il ne peut être remplacé par un président que dans les cas d'absence momentanée ou de quelques jours. Lorsqu'il s'absente de la ville pour un temps plus long, *e.g.*, pour assister comme député à la chambre des Communes du Canada, à Ottawa, pendant la session du Parlement Fédéral, il doit être remplacé par un pro-maire, élu suivant la loi. Un règlement adopté pendant une pareille absence du maire, et sans qu'il ait été remplacé par un pro-maire comme susdit, est nul.—*Compagnie du Chemin de Fer des Rues de Québec v. Cité de Québec*, C.S., Casault, J., 30 déc. 1889.

Sale—Delivery—Extent of damages in case of non-fulfilment.

Held:—The seller of seed, who delivers, not what was bought, but a different kind of seed, which, being sown, does not come to maturity, is liable in damages for the value of the crop which the buyer would have reaped if the seed delivered had been of the kind purchased.—*Côté v. Laroche*, C.C., Andrews, J., Oct. 26, 1889.

Procédure—Assignment—Bref émané dans un district adressé aux huissiers d'un autre district.

Jugé:—L'assignation d'un défendeur dans le district de Montmagny par un huissier de ce district, au moyen d'un bref émané dans le district de Québec, enjoignant aux huissiers du district de Montmagny de faire l'assignation dans le district de Québec, est nulle.—*Corriveau v. Marceau*, C.S., Casault, J., 30 déc. 1889.

Right of creditor to exercise rights of his debtor under Art. 1031, C.C.—Failure of debtor to proceed—Mise en demeure—Parties to suit.

Held:—1. A creditor who, on the distribution of the price of sale of his debtor's property under process of execution, has not been collocated because the proceeds were insufficient and were awarded in the report to a privileged creditor for a claim due by the debtor jointly with another, his warrantor to the extent of one half of the claim, has under Art. 1031, C.C., the right to bring the action the debtor could have brought against such warrantor to recover from him the amount for which he is liable.

2. The failure of the debtor to proceed in warranty against his co-debtor and warrantor, at the time of the distribution of the proceeds of his property, amounts to a refusal and neglect on his part to act, sufficient to entitle the creditor to avail himself of Art. 1031.

3. The debtor was *en demeure* to so proceed, and no further *mise en demeure* of him by the plaintiff was required before bringing suit.

4. It is not necessary, in such a case, that the creditor should join his debtor as co-defendant in the suit brought against the warrantor.—*Gosselin v. Bruneau*, in Review, Casault, Caron, Andrews, JJ., (Casault, J., diss.), April 30, 1889.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER II.

OF THE ESSENCE OF THE CONTRACT, ITS TERM, AND THE PREMIUM.

[Continued from p. 175.]

§ 46. *Effect in France and in England, of acknowledgment of premium paid.*

As to the effect of such agreements, Pardessus, *Droit Commercial*, Vol. 2, says that in France if a policy have been delivered and it state that the premium has been paid, but in reality it has not been, and a loss happens, the insurers must pay; they may only deduct the unpaid premium. If before a loss happens they wish to be freed because the insured will not pay according to promise,

they must (says Pardessus) put him *en demeure*, and tell him clearly that they cancel the policy. Alauzet is to the effect that if, among the conditions of such a policy delivered, there be one stating that the premium must be actually paid or there shall be no insurance, there can be none before actual payment of the premium.

In England, in the case of *Newcastle Fire Ins. Co. v. McMorran*,¹ where the policy contained the condition that there should be no insurance until the premium was actually paid, the insured raised the pretension that there was no effectual policy till the premium was really paid, and as alterations had been made after the policy was issued but before the premium was paid, the insured claimed that after the insurance became effectual he had not altered. McMorran, the insured, lost his case.

§ 47. *Waiver of the condition requiring actual payment of premium to complete the contract.*

The condition, that no insurance shall be regarded as binding until actual payment of the premium, may be waived by the insurer, and the waiver may be proved by parol.

If a policy has been delivered with receipt of premium admitted in it, I would say the condition, against insurance till actual payment, could not avoid such a policy. Even if the policy has not been actually delivered, if delivery was only delayed from pressure of business in the office, the insurance is valid and the contract complete, without payment of the premium.

The case of *Government v. National Prot. Ins. Co.*² was an illustration of waiver, for the company was informed of the loss, yet took the premium afterwards.

In *Sanford v. The Trust Fire Ins. Co.*,³ the charter ordered that the policies must be signed by the President and Secretary, and that every policy and every contract must be in writing, to be binding. But it was held that a court of chancery would interfere where a perfect contract has been made, except the mere omission of the signature of the president and secretary.

¹ 3 Dow, 255.

² 25 Barbour.

³ 1 N. Y. Legal Observer (1842).

The case of *Miller v. Brooklyn Life Ins. Co.*¹ may also be referred to, as to the powers of agents and the validity of a policy delivered, acknowledging payment of premium though none has been paid.

In England, where a policy admits receipt of the premium, it is held that this is conclusive as between the insurers and the insured. So strongly is this held that an action at law for such a premium (as remaining unpaid) cannot probably lie.² In Quebec it certainly would lie.

In Louisiana, a company defendant denied liability, saying that the premium mentioned in its policy had not been received by its agent, and that the agent had no power to grant a policy "till actual payment to him of the premium." Held, that by the acknowledgment in its policy of the receipt of the premium the company was estopped from so denying liability; neither error, fraud, nor duress being pleaded.³

In the case of *Newcastle F. Ins. Co. v. McMorran*,⁴ we see the insurers arguing that notwithstanding such condition—that the insurance takes effect only on payment of premium—there had been insurance from the moment of their local agent debiting himself towards them with the premium, and their argument was held good. The agent had given credit to the insured and was not paid for nearly five months, though before the loss. He had, however, regularly debited himself towards the head office with an amount equal to the premium. Lord Eldon said: "Suppose the fire had burst out the day before the money was paid to the agent, could the company say, 'Though the premium has been paid us by our agent, and we own the receipt of the money, yet as you did not pay the agent we are not bound'?"

§ 48. *Powers of some companies controlled by their charters.*

If the Act incorporating a company order its policies to be in a particular form containing such a condition about premium, the

insurers cannot validly agree to give time, and before actual receipt of premium deliver a policy that shall bind the corporation. But even in this case, if an agent of the corporation have delivered a policy, given time to the insured in which to pay the premium, and have debited himself with the amount of it in the books of the corporation, to its profit, and some time pass, that policy ought to bind the insurers, for the premium is, so, paid to them. The passage quoted above from Lord Eldon's judgment supports this.

§ 49. *Waiver in France of condition requiring actual payment of premium.*

In France, if a company have the habit of sending round to collect premiums past due at the domiciles of the insured, this habit is held waiver of the policy clause ordaining that in default by the insured to pay his premiums punctually, at the office of the insurers, the insured shall forfeit all benefit of the policy.⁵

§ 50. *Default to pay premium—Notice required.*

A clause that default to pay premium shall be fatal only after a *mise en demeure* is to be understood as a *mise en demeure extra judiciaire*. A mere invitation, by letter missive, to pay does not involve forfeiture of the insurance, though the premium be not paid. This was so decided by the Cour Impériale of Paris, in February, 1844.

But a threat and notice to hold policy vacant is different.

In a case in the Journal du Palais of 1872, p. 268, premiums were payable within fifteen days, at the office of the company, yet it was decided that if the company send for them, year after year, not observing even the exact dates of their falling due, it will be held to have waived the clause of *déchéance* for case of non-payment punctually; and though a clause of the policy stipulate that such demanding or going for premiums shall not be held a waiver of the other clause stipulating *déchéance* in case of non-payment punctually.⁶

¹ American Law Review, vol. 5, p. 729.

² 1 Campb. 534, note.

³ La. Annual R. A. D. 1885, p. 737. See Flanders, on Fire Insurance, p. 167.

⁴ 3 Dow 265.

⁵ Cour de Cassation, June, 1845.

Massé, Dr. Comm. Tom. 4, No. 396.

⁶ Cour de Cassation, 31 Jan., 1872. This last is a new clause in France. The editors, in a note, say that the Court on the last question went too far; and so it did. Scotch policies use such reserve in order to claim forfeiture.

CHAPTER III.

OF INSURABLE INTEREST, THE SUBJECT INSURED,
AND WHO MAY BECOME INSURED.

§ 51. *Insurable interest.*

All kinds of things that are subject to risk may be insured by the persons interested in them. Lord Eldon has defined an insurable interest to be "a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."¹

§ 52. *Insured must have interest.*

The person insuring must have an interest in the property insured. To permit wager policies would be most mischievous, and often lead to arson. Even before the 14 Geo. III. Lord King, in *Lynch v. Dallzell*, said "the insured must have a property at the time of the loss or he can sustain no loss, and consequently can be entitled to no satisfaction." In a case somewhat similar, Lord Hardwicke said: "I am of opinion that it is necessary that the party insured should have an interest or property at the time of insuring and at the time the fire happens." They would have held insurance against fire without interest void, in England, at common law. The English Act, 14 Geo. III. c. 48, recites "that the making of insurances on lives or other events wherein the insured shall have no interest, hath introduced a mischievous kind of gaming;" it goes on to enact in substance that no insurance shall be made on the life of any person or on any other event wherein the person for whose use or benefit or on whose account the policy shall be made shall have no interest, or by way of gaming or wagering, and that every insurance to the contrary shall be null. "And in all cases where the insured hath interest in such life, or event, no greater sum shall be recovered from the insurer than the value of the interest of the insured on such life, or other event." That statute never had force in Ireland, or in the Colonies; it never was law in Lower Canada.

Is it necessary that the assured should

¹ *Lucena v. Crawford*, 2 Bos. & P. new R. See also Civil Code of Lower Canada, Art. 2571.

have an insurable interest at the time of insuring? This question was answered in the negative by the Supreme Court of the United States in a marine insurance case,² where a policy of insurance on cargo was obtained by H. & Co. "on account of whom it may concern," in case of loss to be paid to their order (H. & Co.'s). The Court held that interest at the time of effecting the insurance was not necessary.

Injury from loss, or benefit from preservation of it, is a sufficient insurable interest.³

§ 53. *Particular nature of interest.*

Phillips, § 588, says in general the insured need not disclose the particular nature of his interest, e.g. a trustee. Arts. 2569 and 2571 of the Civil Code of L. C., which say that the nature of the interest must be specified, seem to be against this.⁴

Art. 2480 of the same Code says that a policy in the object of which the insured has no insurable interest is null. So, on a sale of a ship by B to C, if there be no registration, and the forms for transfer that are prescribed by the Shipping and Navigation Acts be not observed, no interest is in C.

The interest of the insured may be that of an owner, or of a creditor, or any other interest appreciable in money in the thing insured. C. C. of L. C. Article 2571.

In New York and Massachusetts it has been held (as in *Caldwell's* case above) that the insured need not declare the nature of his interest unless a condition of the policy require it; but may insure as owner general.

§ 54. *Description of interest in marine insurance and in fire insurance.*

As to the description of the interest, in marine insurance no description is required of the peculiar nature of the interest of the insured, whether it be legal or equitable, absolute or contingent, permanent or temporary, but any particular or special interest may be protected by a policy in

² *Hooper*, applt., 8 Otto.

³ *Lucena v. Crawford*, 3 Bos. & Pul. was cited; also 1 Perkins' Arnould, 238.

⁴ In *Caldwell v. Stadacona F. & L. Ins. Co.*, the Supreme Court of Canada held that under the law of Nova Scotia the interest of the insured need not appear unless required by the conditions of the policy. (1883.)

general words. But in *Columbian Ins. Co. v. Lawrence*, 2 Peters, 25, the Supreme Court of the United States held that the rule is different in fire insurance, and that in cases of that kind the nature and extent of the interest insured are material to the risk, and that a proposal or offer for fire insurance must state the interest of the insured.

The Courts of Massachusetts and New York more correctly recognize no distinction in this respect between marine and fire insurance, and hold that the insured's duty of communicating the nature of his interest is no greater in the latter than in the former. Their position is that the insured is not bound to state the exact extent of his insurable interest at the time of his application, unless asked; that if the insurer deems the character of the interest material it is his business to make enquiries. *De prime abord* insured may insure as owner general.¹

So it is in Lower Canada, if conditions express do not bind to an exact declaration of interest. Now, policies generally require it, and the Civil Code now requires interest to be described.

[To be continued.]

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, May 23.

Judicial Abandonments.

Hyman Bercovitch, clothier, Montreal, May 19.
Georges Lachaine and Gattien Lachaine, Bulstrode, May 12.

Curators appointed.

Re Dame Elodie Coté.—Bilodeau & Renaud, Montreal, joint curator, May 16.
Re G. R. Fabre, Montreal.—Kent & Turcotte, Montreal, joint curator, May 16.

Dividends.

Re N. Bourgeois & Co.—Second and final dividend, payable June 11, C. Desmarteau, Montreal, curator.
Re Maxime Deschênes.—First dividend, payable June 12, C. Desmarteau, Montreal, curator.
Re André Dubrûle.—First and final dividend, payable June 10, C. Desmarteau, Montreal, curator.
Re Gagnon & Co., Lévis.—First and final dividend, (34 p.c.) payable June 6, D. Arcand, Quebec, curator.
Re A. Hardy & Co., Montreal.—Dividend, payable June 10, Seath & Daveluy, Montreal, joint curator.
Re John Henry Hodges, Montreal.—Second and final dividend, payable June 11, W. A. Caldwell, Montreal, curator.

Re Benjamin Hugman, Montreal.—Final dividend (10 p.c.), payable June 10, J. McD. Hains, Montreal, curator.

Re Léger & Cie., Montreal.—First and final dividend payable June 11, W. A. Caldwell, Montreal, curator.

Re J. E. Martin.—First and final dividend, payable June 5, F. Valentine, Three Rivers, curator.

Re Malcolm McCallum.—First and final dividend, payable June 10, C. Desmarteau, Montreal, curator.

Re F. X. Mercier, lumber dealer, St. Hyacinthe.—First and final dividend, payable June 11, J. Morin, St. Hyacinthe, curator.

Re Elie Rochon, Ste. Cunégonde.—First dividend, payable June 16, Thos. Gauthier, Montreal, curator.

Separation as to property.

Paola Massardo vs. Eduardo Ferrero, trader, Montreal, May 20.

Appointment.

Arthur Boyer, appointed member of the executive council of the province of Quebec.

Quebec Official Gazette, May 31.

Judicial Abandonments.

Vital Côté, Arthabaskaville, May 26.
Victor Vaehon, trader, parish of St. Dominique, district of St. Hyacinthe, May 28.

Curators appointed.

Re Oscar Beauchamp, Montreal.—Kent & Turcotte, Montreal, joint curator, May 27.

Re Beauchemin & frère, Nicolet.—C. A. Sylvestre, Nicolet, curator, May 23.

Re E. Beaulieu & Cie.—Millier & Griffith, Sherbrooke, joint curator, May 27.

Re Hyman Bercovitch.—A. W. Wilks, Montreal, curator, May 26.

Re Wm. Bouchard, trader, Chicoutimi.—H. A. Bedard, Quebec, curator, May 7.

Re G. Lachaine & Co.—A. Quesnel, Arthabaskaville, curator, May 26.

Re Pierre Plourde, saddler, Fraserville.—P. Languais, Fraserville, curator, May 27.

Dividends.

Re Chas. Beaulieu, tailor, Quebec.—First and final dividend, payable June 9, H. A. Bedard, Quebec, curator.

Re Maurice Bernard, St. Germain de Grantham.—First and final dividend, payable June 18, Kent & Turcotte, Montreal, joint curator.

Re L. A. Bergevin, dry goods, Quebec.—Second and final dividend, payable June 9, H. A. Bedard, Quebec, curator.

Re L. N. Boiselair.—Dividend, payable June 16, J. Beaudry, Three Rivers, curator.

Re J. E. Caron, dry goods, Quebec.—First and final dividend, payable June 16, H. A. Bedard, Quebec, curator.

Re Louis Pelchat, trader, St. Valier.—First and final dividend, payable June 9, H. A. Bedard, Quebec, curator.

Re Wm. Stanley, bookseller, Quebec.—First dividend, payable June 16, H. A. Bedard, Quebec, curator.

¹ *Tyler v. Etna F. I. Co.* 12 Wend. See to this effect, *Flanders*, p. 356, note.

Deed of Composition.

Re James Perry, Sorel.—Application for confirmation, Sorel, June 27.

Separation as to Property.

Marie Olympe Daoust vs. Louis Depocas, trader, Salaberry de Valleyfield, May 21.

Marie Raymond vs. Gilbert Magnan, trader, Sorel, May 26.

Commission.

F. L. Bêlique, Q.C., and Jacques Malouin, Q.C., appointed commissioners to conduct an inquiry into alleged bribery of members of Quebec legislature with \$10,000 obtained from J. P. Whelan.

GENERAL NOTES.

THE CRIMES ACT.—A parliamentary return was issued on May 21, containing the names of all persons proceeded against under the Criminal Law and Procedure (Ireland) Act, 1887, from November 30, 1886, to March 31 last. The total number of persons (1,207) is made up of 196 in Leinster, 628 in Munster, 142 in Ulster, and 241 in Connaught. Charges were withdrawn in 102 cases, 327 persons were acquitted, and 769 convicted, while nine cases were pending. There were 233 appeals lodged; the sentence was increased in one case, confirmed in 110 cases, reduced in fifty-five, reversed in seventeen, and forty-two were pending. Of the charges, 174 were for criminal conspiracy, 198 intimidation, 160 riot, 321 unlawful assembly, 139 taking forcible possession, 187 assault on or resistance to sheriff, constable, bailiff, etc., nineteen taking part in meeting of suppressed branch of National League, seven inciting to criminal conspiracy, and two publishing proceedings of suppressed branch of National League.

CHANGES IN PROFESSIONAL BUSINESS.—The purely intellectual character of the profession, as distinguished from the sensational or muscular, becomes more marked every day. Now, more than heretofore, its prizes are won by those who ceaselessly read and think. A few years ago a great advocate was the great lawyer. He was ruler of the twelve—King in slander, breach of promise, and murder. Court rooms were crowded when he arose to speak; bar rooms were stifed when he went to drink. The eye of admiration and finger of notoriety followed him on the street. Now mark the change; agriculture is no more the chief employment. Its quiet ways are succeeded by the stunning roar of manufacture and trade. . . . Capital and labor have each become organized, and vast corporations have been created to gain, save and insure property. Money, not philanthropy, is the aim of these great institutions. They have no use for a lawyer who can only guess, talk or fight. The lawyer who can serve them does it by thinking and writing. He is wanted to keep them out of trouble, as adviser, not as pleader; in the office, not in the court room. I was surprised a few years ago to hear a distinguished lawyer say he had not argued a case in court for years, yet he was in practice all the time, and had won a million at the bar.—*Address of Mr. Brooks before the Ohio State Bar Association.*

LAWYER'S DRESS.—In an address on the "Ethics of the Law," delivered before the Florida Bar Association, Mr. Edward Badger discussed the lawyer's dress as follows:—'An additional virtue in a lawyer is a due regard for dress and appearance. They are not noted, as a rule, for their tendency to dadeism, but quite the contrary, and a well-dressed lawyer is the exception to the rule. 'Decency of exterior evinces a proper regard for the opinion of others, and tends to enlarge the lawyer's influence. It is calculated to recommend him to the good will of those, by no means a contemptible number, who judge from externals.' The sight of a well-dressed man is at all times a pleasing one, and there is no reason why a lawyer may not be dressed as well as others. It costs no more to be decent than the contrary, and the advantages gained are so extensive that it is a wonder so sensible a class of men as lawyers certainly are, should not appreciate the benefits derived therefrom, and govern themselves accordingly. It is certainly not only a good but a very polite thing to be well dressed, as it shows a flattering deference to the opinions of society. . . . The conduct of an attorney in court should be marked by the distinctive features of that gentleman in society. He should observe a proper decorum; deferential, though not servile, to the judge, suave and amiable to his brothers and polite to all. Abruptness or roughness of any kind is as much out of place in the court room as in the parlor. The bull is in his proper place in the pasture, but we exclude him from the garden or the china shop. Hoisting the feet upon the tables, sitting astraddle of the chairs, lolling back negligently upon the benches, smoking, chewing, whittling, talking, whispering or any of the many rude and careless acts which may be witnessed in a court ruled over by an impolite judge, should be avoided as unrefined and vulgar; not only unbecoming a lawyer and gentleman, but the commonest member of the most ordinary society."

DIVORCES IN FRANCE.—The divorce law passed in France in 1884 seems to be operating with terrible effect. In 1884 there were 3,657 divorces; in 1885, 4,123; in 1886, 4,007 in 1887, 5,797. But the most astounding statement made is that in the department of the Seine—i.e., Paris and its neighborhood—there are no fewer than 62.8 divorces to every thousand marriages, or that considerably more than one in twenty marriages (say one in sixteen) ends in a divorce. On the other hand, in the Finistere and the Cotes du Nord not much more than one in a thousand marriages ends in a divorce—a curious testimony this to the different morale of Parisian and provincial life in France.—*The Spectator.*

SOLICITORS GOING TO THE BAR.—Solicitors appear to appreciate the new rule admitting them to the bar, after giving twelve months' notice and passing the examination. No less than fourteen have passed from the one branch to the other. This, says the *Law Times*, is fusion of the right order, although juniors in practice complain that solicitors who have been some time in the profession enter the bar with undue advantages. This may be so, but it can not be helped. It will be interesting to see whether this sort of competition drives away the youth from the Universities.

The Legal News.

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The judgment of the Court of Review in *Jetté v. Crevier*, reported in the Montreal Law Reports, 6 S.C. pp. 48-68, presents a careful examination of the question involved, viz., whether interest accruing under a judicial condemnation is included in Art. 2250, C.C., which declares that "with the exception of what is due to the Crown, all arrears of interest, and generally all fruits natural or civil, are prescribed by five years." The Court of Review, Justices Loranger, Wurtele and Davidson, arrived at a unanimous conclusion in the affirmative, and that result is supported by the text of the article cited. On the other hand, three learned judges, Taschereau, Gill and Cimon, JJ., each sitting alone, came to the conclusion that the interest is part of the judicial condemnation, and comes under Art. 2265, which says "any judicial condemnation constitutes a title which is only prescribed by thirty years." One of these decisions, *Nantel v. Binette*, is reported in 12 Leg. News, 345. The judgment of the Court of Review has the additional weight of a later opinion formed by three judges with the advantage of mutual consultation; but in view of the conflict noted above it is satisfactory to learn that the question will be submitted to a higher Court. Incidentally it may be remarked, this case may be commended to the notice of those who look confidently to a Code to make all things certain in the law. Our codifiers had the advantage of knowing that a similar difficulty had arisen in France under the Code Napoléon, yet, with that before them, they did not succeed in making the law so plain as to prevent six learned judges from being equally divided.

The relative position of directors and shareholders in some companies is illustrated by the following anecdote; if the "shareholder" profits by the lesson taught him, he may find that his lost halfpenny was a profitable investment:—"Two small boys

passing along the road approached a tobaccoist's shop, whereupon the younger said to the taller and older lad: 'Say, Bill! I've got a ha'penny, and if you've got one too we'll have a penny smoke between us.' 'Certainly,' acquiesced Bill, and handed over his copper. Tommy vanished into the shop, and shortly reappeared with a penny 'Pickwick' in his mouth and emitting clouds of smoke. Away walked the lads together for some time, then the taller boy asked: 'Say, Tommy, ain't I going to have a puff. The weed is half mine?' 'Oh, you shut up, Bill,' was the answer; 'I'm chairman of this company; you are only a shareholder. You can spit.'"

COURT OF QUEEN'S BENCH — MONTREAL.*

Quebec Election Act, 38 Vict. ch. 7, s. 272—Misc en cause—Quebec Controverted Elections Act, 38 Vict. ch. 8—Jurisdiction of Court of Review.

At the trial of the election petition against the return of a member to represent the County of Laprairie, in the Quebec legislative assembly, evidence was given that the appellant had committed acts of bribery and corruption at the election, whereupon he was summoned, under sect. 272 of the Quebec Election Act of 1875, to appear and answer the charges made against him. He appeared, denied the charges, went to evidence, and the case being heard before the Superior Court sitting in Review, as a Court of first instance, under the Controverted Elections Act of 1875, he was found guilty of two cases of corrupt practices at the election, and condemned to pay a fine of \$200 for each offence, with costs and imprisonment, in default of payment.

Held.:—(Reversing the decision of the Court of Review, M.L.R., 6 S.C. 102), 1. That the Quebec Election Act of 1875 confers no authority upon the Superior Court sitting in Review, to enquire into and determine any charge of corrupt practices against the provisions of the Act; the only authority con-

*To appear in Montreal Law Reports, 6 Q.B.

ferred by the Act to try and determine such charges being conferred on the Superior Court held by one judge thereof, as provided for by sects. 272, 273, 274 and 292 of the Act.

2. That the jurisdiction of the Superior Court sitting in Review is limited, by the Controverted Elections Act of 1875, to the hearing of the parties to an election petition and the determination of the issues raised thereon between the parties to such petition, including charges of corrupt practices against any of the candidates, at the election, who are made parties to the Controverted Election petition.

3. That as the appellant was neither an elector nor a candidate, nor a returning officer, nor a deputy returning officer, at the election; he could not be, and in fact was not, a party to the election petition, and was not amenable to the jurisdiction of the Court of Review, as a Court of original jurisdiction.

4. That the power conferred by sub-section 4 of section 89 of the Controverted Elections Act, to determine all matters arising out of the election petition, refers to such matters only as are in issue on the election petition between the parties thereto, and does not extend to collateral and independent issues with parties unconnected with the election petition, such as charges of corrupt practices against persons who were not candidates at the election and are not parties to the election petition.

5. That the Superior Court sitting in Review had no jurisdiction to hear and determine, as a Court of first instance and without appeal, the charges of corrupt practices against the appellant; the Superior Court held by one judge or a judge thereof having sole jurisdiction in the matter, subject to a review before three judges and to an appeal to this Court as provided for with regard to judgments rendered by the Superior Court.

6. That an appeal lies to this Court from every judgment rendered by the Superior Court sitting in Review for excess of jurisdiction, and that that part of the judgment of said Court by which the appellant was found guilty of corrupt practices and con-

demned to pay two fines of \$200 each, with costs and imprisonment in default of payment, is *ultra vires* and must be set aside, and the record returned to the Superior Court, in order that the proceedings may be continued, as if the case had not been heard, nor adjudicated upon, by the Court sitting in Review.—*McShane & Brisson*, Dorion, (Ch. J., Tessier, Baby, Church, Bossé, JJ., Jan. 25, 1890.

Jury trial—Insufficient assignment of facts—Answers—New definition of facts ordered.

Held :—Where both parties move for judgment on a special verdict, and there is no motion for a new trial, nevertheless, on appeal, if it appear to the Court that the facts as defined for submission to the jury were inapplicable and insufficient to enable a correct verdict to be rendered thereon, and that the answers of the jury were insufficient and contradictory to the extent that no correct judgment could be rendered thereon for either party, the Court of its own motion may set aside the judgment, and send the parties back to the Court below, to proceed anew to a proper definition of facts, for submission to a jury to be summoned by a *venire de novo*.

The condition of an accident policy, in favor of members of a firm of *McL. & Co.*, was: "Provided that on either of the above named members quitting the said firm, this insurance shall cease on his person, etc." The jury were asked: "3. Were *McL. & Co.* dissolved on or about the 10th April?" To which they answered, "Yes; but *J. S. McL.* had a continued and active interest in the business." "4. Did *McL. & Co.* in that month publicly advertise that *J. S. McL.* had retired and that a new firm had been formed?" To which they answered, "Yes." "5. Was *J. S. McL.* a member of *McL. & Co.* on the 18th November?" (date of his death by drowning). To which they answered, "No, but had an interest in profits of."

Held :—2. That inasmuch as the jury were not asked, and did not state, in the precise words of the condition, whether *J. S. McL.* had "quit the firm" on the 18th November, and their answers were insufficient to enable

the Court to render a correct judgment thereon, it was a case in which the Court should order a new definition of the facts for the jury, with leave to the parties to proceed by *venire de novo*.—*McLachlan & Accident Insurance Co. of N. A.*, Dorion, Ch. J., Cross, Baby, Church, Bossé, JJ., Jan. 25, 1890.

Libel—Matter of public interest—Damages—Appeal—Costs.

Held:—Where the Court below dismissed without costs an action of damages against the publishers of a daily journal, on the ground that the matters charged as libellous were substantially true, and referred to a subject of public interest: that an appeal should not be maintained from such judgment, where no damages were proved, even supposing that a small sum of exemplary damages might properly have been allowed the plaintiff by the Court of first instance on account of certain injurious expressions used by the defendants; but the Court of Appeal in such cases may exercise its discretion, and dismiss the parties without costs in either Court.—*Ouimet & Cie. d'Imprimerie et de Publication du Canada*, Dorion, C.J., Tessier, Cross, Church, Bossé, JJ., Jan. 19, 1889.

Slander—Criticism of conduct of member of Parliament—Imputation of dishonest motives.

Held:—(Affirming the judgment of the Court of Review, M.L.R., 2 S.C. 484), That while the conduct of a member of Parliament in his public capacity is subject to criticism, and an action is not maintainable for an imputation which arises fairly and legitimately out of his conduct as such member, an imputation, unsupported by evidence, of dishonest motives in voting upon a question, and of selling his influence, is unjustifiable, and an action of damages based upon such accusation will be maintained.—*Bauchamp & Champagne*, Tessier, Cross, Church, Doherty, JJ., Sept. 27, 1888.

Commission nommée par le gouvernement—Destitution d'employés—Secrétaire—Engagement à tant par année—Louage d'ouvrage—Mandat—Dommages—Salaires—Frais.

En vertu de leur charte les commissaires

des chemins à barrières de Montréal, nommés par le gouvernement de la province, "auront et pourront avoir succession perpétuelle et pourront ester en jugement dans toutes les cours de justice et autres lieux."

Une autre section de leur charte pourvoit à ce que "de temps à autre ils pourront nommer et employer un inspecteur, et tels officiers et personnes sous leurs ordres qu'ils jugeront nécessaire pour les fins de cette ordonnance, et ils pourront destituer tels inspecteurs et autres officiers et personnes ou aucune d'elles, et en nommer d'autres à à leur place."

Jugé:—1. Que les commissaires en question ne forment pas partie du service civil de la province, mais constituent une corporation indépendante dont les pouvoirs sont contenus dans l'ordonnance 3 Vict. c. 31, et les actes qui l'amendent.

2. Que, partant, les commissaires ne peuvent pas se prévaloir des prérogatives de la Couronne pour justifier le renvoi de leurs employés sans avis, sans cause et sans indemnité.

3. Que la clause de la charte citée plus haut ne fait que donner à la commission le droit de contracter avec ses employés, et que cette corporation ayant contracté avec l'intimé est responsable comme toute autre personne de la violation de ce contrat.

4. Que l'engagement de l'intimé comme secrétaire de la commission pour un salaire de tant par année constitue un contrat de louage d'ouvrage pour une année, sujet à tacite reconduction.

5. Qu'un tel engagement n'est pas pour un temps indéterminé, et n'est pas révocable à la volonté du locataire.

6. Que, dans l'espèce, le salaire stipulé entre les parties doit être la base d'évaluation des dommages, aucune preuve de dommage n'ayant été faite.

7. Que l'action de l'intimé ayant été portée avant l'expiration de l'année pour la balance de salaire pour tout ce qui restait à courir de l'année, la demande était prématurée pour la somme représentant le salaire non encore échu à la date de l'action, et le jugement obtenu par l'intimé pour le plein montant de son salaire doit être réduit à ce qui était échu

à la date de l'institution de son action.—*Commissaires des Chemins à Barrières de Montréal & Rielle*, Dorion, Ch. J., Cross, Baby, Church, Bossé, JJ., 26 mars 1890.

SUPERIOR COURT—MONTREAL.*

Intervention—Contestation—Frais.

Jugé:—Que sur contestation du droit d'intervenir, les frais devront être taxés comme sur l'action principale.—*St. Cyr v. Mathon et vir*, Würtele, J., 1 avril 1890.

Substitution d'avocat—Règle de Pratique XX—Permission du tribunal ou du Juge en vacance.

Jugé:—10. Qu'aucune substitution d'avocat ne peut avoir lieu dans une cause sans la permission du tribunal ou d'un Juge en vacance.

20. Qu'une procédure présentée par un avocat qui aurait été substitué à un autre sans la permission du tribunal ou du Juge en vacance, ne sera pas reçue.—*Ross v. Kerby*, Torrance, J., 23 juin 1885.

Election law—Mis en cause—Jurisdiction—Evidence.

Held:—1. The fact that an election was held may be proved by verbal evidence. Moreover, such fact is a public fact which the courts cannot ignore, when it is not specially put in issue by the parties.

2. An admission of corrupt practice made by the defendant after the adduction of evidence cannot be revoked.

3. Where a person is brought into the case under sect. 272 of the Quebec Election Act of 1875, he is not entitled to the security referred to in the 46 Vict. (Q.) ch. 2, s. 3.

4. A *mise en cause* under sect. 272 may be ordered by the judge presiding at the trial. No special form of summons is necessary: it is sufficient that the person summoned be clearly informed of the nature of the charge against him.

5. A deposition of a witness on the case against a *mis en cause*, taken on a day not appointed for proof, and when the *mis en cause* was not regularly represented, is illegal, and will be rejected.

6. The *mise en cause* of a witness who in his evidence has admitted corrupt practice, is not illegal, but such admission cannot avail as proof on the case against him as *mis en cause*, and the corrupt practice must be established by other evidence.

7. A criminal prosecution against an agent for bribing a voter at an election, does not prevent the *mise en cause* of such agent under sect. 272 of the Election Act, and his condemnation for other corrupt practices at the same election.

8. The Court of Review sitting in an election case may give judgment on the *mise en cause* of a person not a candidate. (The judgment on this last point was reversed in appeal, 6 Q. B. 1.)—*Brisson v. Goyette*, and *McShane*, *mis en cause*, in Review, Jetté, Gill, Loranger, JJ., Jan. 3, 1889.

Enregistrement—Radiation.

Jugé:—10. Que lorsqu'un vendeur a fourni à son acheteur des titres suffisants de la propriété vendue, à la satisfaction de ce dernier, il n'a pas le droit, subséquemment, sans le consentement de celui-ci, et sous prétexte de compléter ces titres, de faire enregistrer sur la propriété vendue des actes faisant voir apparemment qu'il était encore le propriétaire de la dite propriété.

20. Que dans ce cas, l'acheteur a une action pour faire radier ces enregistrements, si le vendeur refuse de le faire.—*Mallet v. Dolan*, Taschereau, J., 15 avril 1890.

Frais—Taxation—Avis—Exécution.

Jugé:—10. Que dans tous les cas, les frais doivent être taxés après avis donné à la partie adverse.

20. Qu'une exécution émanée sans que les frais aient été taxés contradictoirement ou avis donné à la partie adverse est entièrement nulle, et ne peut être exécutée même pour la dette, sans renoncer aux frais ou en donner crédit.—*Frères de la Charité de St. Vincent de Paul v. Raymond*, en révision, Jetté, Taschereau, Tait, JJ., 30 avril 1890.

Acte sommaire—Employé logé par son maître—Occupation—Expulsion—Jurisdiction.

Jugé:—10. Que dans le cas où une corpora-

* To appear in Montreal Law Reports, 6 S.C.

tion municipale a engagé, pour un an, un employé pour travailler pour elle, à raison de \$550, logé et chauffé, et où pour causes jugées suffisantes par le conseil, cet employé a été renvoyé après un mois d'avis, la corporation ne peut prendre une action en expulsion sous l'Acte sommaire, article 887, § 1, du C. P. C., pour expulser l'employé d'une maison appartenant à la municipalité.

20. Qu'un employé dont le salaire est de \$550.00 par année, sans convention quant aux termes de paiement, n'est payable qu'au bout de l'année, et ne tombe pas sous l'Acte sommaire, article 887, § 4, du C. P. C.—*Ville de Maisonneuve v. Lapierre*, en révision, Taschereau, Wurtelle, Tait, JJ., 30 avril 1890.

Montreal, City of—Alderman supplying materials for fulfilment of contract with city, or selling goods to city—37 Vict. (Q.), ch. 51, s. 22—52 Vict. (Q.), ch. 79, s. 25.

Held :—1. An alderman who undertakes to supply the materials required by a contractor, for the execution of a contract with the city of Montreal, derives an interest from such contract, which comes within the prohibition of the statute, 37 Vict. (Q.), ch. 51, s. 22, and renders him incapable of holding his seat as an alderman.

2. All sales of goods by an alderman to the corporation, either directly or through a person interposed, fall within the prohibition of the law.

3. The revised charter of the city of Montreal, 52 Vict. (Q.), ch. 79, being merely a consolidation of the previous Acts affecting the city, the provisions of the latter, re-enacted in the consolidated charter, are deemed to be still in force as to acts done before the consolidation.

4. The contracts referred to in s. 25 of 52 Vict. (Q.), ch. 79, are not those from which a profit to the extent of \$100 is derived, but contracts the price or consideration of which amounts to \$100. The limit applies to the contract itself, and not to the profit made from it.—*Stephens v. Hurteau*, in Review, Johnson, Loranger, Wurtelle, JJ., March 17, 1890.

License law—Opposition to granting of license—Withdrawal of opposants.

Held :—That persons who sign an opposition to the granting of a license, have the right to desist from such opposition at any time previous to the day fixed for the consideration of the application.—*Wiseman v. Dugas & Desnoyers*, Wurtelle, J., April 10, 1890.

Procedure—Summons—Service—Attachment for rent.

Held :—That in an action under Art. 887-888, C.C.P., for rescission of a lease or for ejectment, to which the plaintiff joins as an accessory a demand for balance of rent and an attachment for rent, the service must be made in the usual manner by serving a copy of the declaration with the writ,—Arts. 804 and 874, C.C.P., not being applicable to such case.—*Maguire v. Watkins*, Wurtelle, J., May 20, 1890.

Insolvency—Incorporated company—Winding-up order.

Held :—That a winding-up order may be obtained against an incorporated company when it is in fact insolvent, though sixty days have not elapsed since the service on such company of a demand for payment of an overdue debt; but when a petition for a winding-up order is presented before the expiration of such delay, the petitioner is required to prove the insolvency of the company, unless it be acknowledged, or unless one of the other cases in which a company is deemed insolvent exists.—*E. B. Eddy Manufacturing Co. v. Henderson Lumber Co.*, Wurtelle, J., April 29, 1890.

DECISIONS AT QUEBEC.*

Propriétaire apparent—Contre lettre—Vente judiciaire d'immeuble.

Jugé :—10. Que le propriétaire ayant titre en son nom, dument enregistré, peut faire valoir son droit de propriété à l'encontre des tiers, malgré sa contre-lettre notariée, non enregistrée ;

20. Que cette contre-lettre n'a d'effet, quant au droit de propriété, qu'entre le mandant et le mandataire.—*Lesage & Boily*, en appel, Dorion, J. C., Tessier, Cross, Church, JJ., Pelletier, J. *ad hoc*, 7 fév. 1890.

Quebec Controverted Election Act, 1875—Conviction or judgment—Canvassing—Corrupt practices—Appeal.

Held:—1. That apart from Art. 472, C. C. P., and of sect. 87 of the Quebec Controverted Election Act of 1875, requiring the Court to give in their judgments, their reasons, the charges of corrupt practices at elections being of a penal and quasi-criminal nature, the conviction or judgment should contain a clear statement of the charges on which the defendant has been convicted, or a distinct reference thereto.

2. That on the trial of a controverted election petition and of the recriminatory charges against a candidate, no evidence can be received of charges not specifically detailed in particulars furnished, as ordered by the Court.

3. That accompanying a candidate through a portion of the county, introducing him to the electors, organizing meetings and committees, speaking at such meetings, corresponding and telegraphing about the election generally, is not canvassing within the meaning of the Quebec Election Act of 1875 and its amendments; "*cabaler*," to canvass, consisting in the act of privately soliciting votes for a particular candidate, or in soliciting electors to abstain from voting for an adverse candidate.

4. That although the employment of paid canvassers (*cabaleurs*), which is expressly prohibited by the Quebec Election Act of 1875 and its amendments, is a corrupt practice, the payment of persons employed for other purposes not expressly prohibited, only becomes a corrupt practice, under subsection 3 of sect. 249 of said Act, when done with a corrupt intent to unduly influence the election, such as when the employment is unnecessary, or otherwise colorable, or the payment in excess of the services rendered.

5. That the only appeal contemplated by the Act 52 Vict. (Q.) ch. 10, is an appeal by

a party convicted of corrupt practices at an election; that no cross appeal is allowable under the Act, and therefore the only charges which the Court of Appeal is called upon to adjudicate are those upon which the appellant has been convicted by the Court below.—*Whyte & Johnson*, in appeal, Dorion, C. J., Tessier, Cross, Baby, Church, JJ., Feb. 7, 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER III.

OF INSURABLE INTEREST, THE SUBJECT INSURED,
AND WHO MAY BECOME INSURED.

[Continued from p. 183.]

§ 55. *Wager policies.*

By statutes in New York and other States, wager insurances are prohibited.¹

In *King v. State M. F. I. Co.*, the insurer insured "his interest" in a building. After the fire he stated it. That is sufficient, unless the condition of the policy be to the contrary.

In *Box v. Provincial Ins. Co.*,² 3,500 bushels of wheat, bought by the insured, and which formed part of a larger quantity, had not been separated from the rest; it was held that there was no insurable interest.

§ 56. *Stipulation that policy shall be proof of interest.*

In England, in marine insurance, to agree by policy that the policy itself shall be proof sufficient of the insured's interest, or to insure "interest or no interest," makes the policy totally void as a mere wager. In Lower Canada such an agreement in fire assurance would be held valid to the extent of saving the insured from burden of proof of interest in the first instance.

¹ *Alsop v. The Comm. Ins. Co.*, 1 Sumner's Rep.

² 15 U. C. Chanc. Rep. The very contrary of this was decided in the *Matthewson case*, Q. B. appeals, March, 1871. But suppose all destroyed? But if less be destroyed, how can the insured say that his has been?

§ 57. *Interest to be stated truly.*

The mortgage creditor insuring ought to state his interest particularly, and truly.

A policy issued by a mutual company was expressly made subject to their by-laws, one of which provided that "unless the applicant shall make a true representation of the property insured, and of his title and interest in it, and also of all incumbrances and the amount and nature thereof, the policy shall be void." The applicant represented, in answer to questions, that the property was owned by him and not incumbered; whereas he was only a mortgagee. Held, that the policy was void.¹

If disclosure of insured's interest or title be called for by the conditions, A insuring goods as his when they are really the property of a partnership, the policy will be held null. But Flanders, p. 307, says, if no call for such disclosure be made by the conditions, A will get his proportion of the amount of the policy. The Civil Code of Lower Canada, however, requires the nature of the interest to be specified (Art. 2571).²

§ 58. *Interest not insurable unless legal.*

An important requisite of an insurable interest is its *legality*. If it is illegal, it will not be insurable. The general principle in regard to the illegality of the interest is well stated by Mr. Phillips to be, "that if a contract be intended to indemnify the owner from loss on property by reason of its being implicated in an illegal trade, or applied to an illegal use, or which, according to the laws of the country where the contract is made, it is criminal for the owner to hold, such contract is void; and accordingly the owner has no insurable interest."³

This principle is frequently applied to marine insurance in cases of policies on cargoes of contraband goods or on ships sailing in violation of an embargo, etc., and though no cases are reported of its application to fire insurance, there seems to be no

reason why it does not govern that branch of the subject as well as the other. It is forcibly remarked by Mr. Duer, "that there can be no more direct encouragement to the violation of a law than a contract that secures an indemnity to the transgressor."⁴ Therefore it may well be questioned whether in such States as have enacted very stringent prohibitory laws in regard to the sale of intoxicating drinks, as Maine, Vermont, Massachusetts, and others, an insurance upon a stock of liquors, held in contravention of such a law, would not be invalid. In marine insurance, if the trade be illegal, it defeats the policy on the ship as well as that on the cargo, but it is doubtful whether an illegal trade on land would vitiate the insurance upon the building in which it is carried on, particularly when the owner of the building is not the person engaged in the prohibited traffic.⁵

A policy illegal by the law of insured's domicile was sustained, the law of the Company's domicile not prohibiting; this was where the insured's proposal was received, and the policy granted as asked.

But the legality of a note given for premium depends on the law of the place where made. *Ch. of England Ass. Co. v. Hodges*, 1857. See Savigny, by Guthrie. P. 184.

§ 59. *Insured must have interest at time of effecting insurance.*

Ellis says:—"Another distinction may also be observed between marine policies and those against fire. It is sufficient if a marine policy be effected before the interest of the property commences, if it be made in time to meet the risk insured against, for the stat. 14 Geo. 3, c. 48, s. 1, does not extend to marine policies, and such restraint would be

¹ Duer's Ins. 315.

² In *Jehnon v. Union Ins. Co., Mass.*, 1879 (P. 5 Alb. L. J. of 1890), the plaintiff insured on his stock and personal property: \$900 on billiard tables, \$500 on bar and saloon fixtures; \$100 on stock in trade, liquors, cigars, glass ware, contained in building on Franklin street. The plaintiff was not licensed to keep billiard tables for gain, which he was doing. The policy was held illegal, and the whole contract held void. The case was held to be governed by *Kelly v. Home Ins. Co.*, 97 Mass.—Is insurance null on liquors kept by an unlicensed person? The *Kelly* case says yes.

³ *Jenkins v. Quincy M. F. I. Co.*, Monthly L. Rep. of 1856.

⁴ In *Catron v. Tennessee Ins. Co.*, the insured, who owned only half of a house, insured it as his, and the policy was held null. Flanders, p. 307, note.

⁵ Phillips' Ins. 183.

highly prejudicial to commerce; but, as we have seen both by the decisions anterior to the statute, as well as by the statute, the insured must have an interest in the property at the time of effecting an insurance against fire, as well as when the loss happens."

Every policy in England will be presumed on interest unless something be shown to establish the contrary.¹

But in *Rhind v. Wilkinson*² it was held that interest at the time of effecting the policy is immaterial: it is sufficient if it be at the commencement of the risk.

§ 60. Future or expectant interest.

It is the opinion of Mr. Phillips, in opposition to the dictum of Lord Chancellor Hardwicke, in *Saddlers' Co. v. Strobe*, 2 *Atkyns* 555, that there is no principle of Common Law which prevents a valid insurance on a future or expectant interest *against fire*, any more than against the perils of the sea, but that either a marine or fire policy will cover such an interest in the absence of fraud, misrepresentation, or concealment.³

In Lower Canada no insured can recover beyond his interest made out, but he need not be absolute or unqualified owner of the subject insured, nor have immediate interest in it. Trustees, pawnees, factors, commission agents, common carriers, may insure goods, or property, to the extent of any possible interest in them that they may or can have; subject, of course, to the conditions of policies which may require the nature of the interest insured to be specified; subject also to our Civil Code.

[To be continued.]

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, June 7.

Judicial Abandonments.

Elzéar Laverdière, trader, parish of St. Pierre de Montmagny, June 4.

Cléophas M. Lavigne, grocer, Montreal, June 2.

Pronovost & Roy, traders, St. Félixien, May 23.

Curators appointed.

Re Vital Théodore Dorais, trader, St. Valentin.—C. H. Parent, Montreal, curator, May 29.

¹ *Courvine v. Nantes*, 3 Taunt.

² 2 Taunt (a marine insurance on ship and freight).

³ 1 Phillips, Insurance, 118.

Re Henderson Lumber Co., Montreal.—A. F. Bidell, Montreal, liquidator, May 31.

Re Jean Baptiste Lafontaine, district of Chicoutimi.—J. B. E. Letellier, curator, May 28.

Re Prosper Lafontaine, trader, Lac Bouchette.—J. B. E. Letellier, curator, May 28.

Re Fred. Moor & Co. (late Connolly & Moor), Windsor Mills.—J. McD. Hains, Montreal, curator, June 3.

Re Félix Trudeau, Napierville.—Kent & Turcotte, Montreal, joint curator, May 29.

Dividends.

Re W. T. A. Donohue, trader, Roberval.—First and final dividend, payable June 23, H. A. Bédard, Québec, curator.

Re Isidore Durocher, Montreal.—First dividend, payable June 26, C. Desmarteau, Montreal, curator.

Re André Lapierre, parish of St. Barthélemi.—First and final dividend, payable June 25, J. E. Rouleau, St. Barthélemi, curator.

Re Dame Marie C. E. Nolin, St. John.—First and final dividend, payable June 17, Bilodeau & Renaud, Montreal, joint curator.

Re Hugh O'Hara, Montreal.—First and final dividend, payable June 26, C. Desmarteau, Montreal, curator.

Re F. J. Scheak & Co.—First and final dividend, payable June 24, W. J. Common, Montreal, curator.

Re Alfred Trudeau.—First and final dividend payable June 10, J. M. Marcotte, Montreal, curator.

Separation as to property.

Laura Jane Huntton vs. Charles D. Lapointe, farmer, township of Barnston, district of St. Francis, May 28.

Quebec Official Gazette, June 14.

Judicial Abandonments.

William Neil, trader, Montreal, May 12.

Edmond Pérusse, lumber merchant, Port Daniel, county of Bonaventure, May 29.

Machinery Supply Association, Montreal, June 11.

Narcisse Turgeon, tanner, Lévis, May 27.

Curators appointed.

Re Dominion Illustrated Publishing Co., Montreal.—J. B. Clarkson, Montreal, curator, June 7.

Re James Hoolahan, Montreal.—Kent & Turcotte, Montreal, joint curator, June 10.

Re Thomas Lamy, Louiseville.—Kent & Turcotte, Montreal, joint curator, June 4.

Re William Neil, Montreal.—Henry Ward, Montreal, curator, May 20.

Re Victor Vachon, trader, parish of St. Dominique.—J. O. Dion, St. Hyacinthe, curator, June 12.

Dividends.

Re Charles Tellier, St. Félix.—Dividend, payable July 16, E. Guilbault, Joliette, curator.

The Legal News.

VOL. XIII. JUNE 21, 1890. No. 25.

The list of judgments delivered by the Court of Appeal at Montreal, on Thursday last, is a peculiar one,—ten appeals were dismissed—not one allowed. The only dissent was a silent one, the dissentient judge not being present when the judgment was pronounced. Such harmony *inter se*, and with the Courts below, is very remarkable; and considering that the cases carried to appeal are selected by the bar from a very much greater number of judgments of first instance, it would seem to indicate that the work of the Courts below is carefully performed.

One of the most important cases disposed of by the Court was *C. P. R. Co. & Robinson*, in which the judgment of the Court of Review, reported in M. L. R., 5 S. C. 225-249, was unanimously affirmed. The action was by a widow, under Art. 1056 of the Civil Code, to recover damages occasioned to her by the death of her husband, who was fatally injured through the negligence of the company's employees. The only question of importance was one which was first raised at the argument before the Court of Review, namely, the husband's action having been extinguished by prescription before his death, had the widow the remedy indicated by Art. 1056? The Court of Appeal unanimously decided, assuming that the husband's action had been prescribed before he died, that this did not deprive the widow of the right to sue under Art. 1056. That right does not pertain to her as heir of her husband, but is a distinct right, which is extinguished only where the husband has obtained "indemnity or satisfaction" before his death. An *obiter dictum* of the Chief Justice is of interest. His Honour considered it very doubtful whether prescription runs against an injured person from the date of the accident. Should it not rather be from the date of his recovery? In these cases

damages must be proved. How can the bills for surgical and medical attendance be proved while the doctors are still in daily attendance? How can the cost of an artificial leg be claimed before the crippled plaintiff has sufficiently recovered to make it clear that he will ever be in a condition to use it? It does seem a monstrous injustice to suppose that prescription is running while an unfortunate man is lying mangled and exhausted, in pain and want and misery, growing daily more helpless until the end comes. It was not necessary to decide this question in the *Robinson* case, because the Court held that the prescription of the husband's claim before death could not affect the right of the widow under Art. 1056, but the point will probably be heard of again in some other case.

A question of interest to the bar and to the officers of the Court was decided this week by Mr. Justice Würtele in *Bossière v. Bickerdike*, 6 S. C. The question was whether the prothonotary could be punished for contempt for failing to produce a record, where no wilful neglect was charged against him. The Court decided in the negative, and held that the remedy was by civil action of damages. If it were not so, the prothonotary would be liable to imprisonment for an indefinite period in consequence of the disappearance of a record through the carelessness of an employee not appointed by himself.

COUR SUPERIEURE (CHICOUTIMI.)

Coram ROUTHIER, J.

DONAIS V. BOSSÉ.

Responsabilité du Shérif.

JUGE:—*Qu'un shérif qui n'a pas légalement assigné les jurés, est responsable en loi, vis-à-vis d'un accusé qui n'aurait pu pour cette raison subir son procès au jour fixé, et doit lui rembourser les frais qu'il a encourus à cette occasion.*

PER CURIAM:—Demande de \$540.40 dommages, étant le montant d'argents déboursés par le demandeur dans les circonstances suivantes:

Au terme dernier de la Cour Criminelle à

Chicoutimi (13 février 1874), un indictment pour félonie contre le demandeur fut soumis aux grands jurés et rapporté par eux comme fondé. Le demandeur plaida non-coupable et son procès fut fixée au 19 février. Le 19 février il fit déclarer nuls, et fit mettre de côté par la Cour, les listes des grands et petits jurés, et le tableau de petits jurés, puis il fit application pour qu'il lui fût permis de retirer son plaidoyer général de non-coupable, et lui substituer un plaidoyer *in abatement* qu'il produisit. La Cour prit ce plaidoyer en délibéré et fut ajournée au terme suivant.

Le demandeur prétend que s'il n'a pas subi son procès le 19 février, c'est parce que les listes et tableaux des jurés avaient été faits illégalement par le défendeur et ont été annulés par la Cour; que pour subir son procès ce jour-là, il avait assigné des témoins et retenu les services d'un avocat et d'un conseil; qu'il a ainsi déboursé inutilement et en pure perte par la faute du défendeur une somme de \$540.40 pour assignation et taxe de témoins, honoraires d'avocat et conseil et autres dépenses, et que le défendeur est tenu de lui rembourser la dite somme à titre de dommages.

Le défendeur répond à cette action qu'il a fait les listes de jurés et les tableaux, avec soin et de bonne foi, et que cela suffit pour dégager sa responsabilité; que d'ailleurs les erreurs qu'il a pu commettre et l'annulation de ses procédures par la Cour, n'ont pas été cause que le demandeur n'a pu subir son procès au jour fixé (19 février 1874.)

La première question soulevée par cette défense est donc une *question de droit*, et la seconde une *question de fait*.

Sur la première je suis d'avis que le défendeur a tort. S'il est vrai que le demandeur n'a pu subir son procès au jour fixé parce qu'il n'y avait pas de jurés légalement assignés, le défendeur est responsable en loi, et doit lui rembourser les frais qu'il a encourus à cette occasion.

Il est certain que les officiers publics ont droit à une certaine protection et ne doivent pas être jugés trop sévèrement. Mais ils sont tenus de connaître les devoirs que la loi leur impose, et ils doivent les remplir comme la loi le veut. Je comprends que la responsa-

bilité du défendeur ne serait pas engagée s'il s'était trompé dans l'interprétation d'une loi obscure et douteuse. Mais ici, il s'agit d'une loi très claire, qu'il comprenait très bien, nous en sommes sûr, mais qu'il a cru pouvoir mettre de côté en se fondant sur une pratique vicieuse et un usage suivi depuis longtemps. Il est bien évident qu'il a fait la chose sans aucune malice, et sans prévoir qu'elle pût être préjudiciable au demandeur ou à aucun autre. Mais il n'en reste pas moins vrai qu'il a commis une faute dans l'exercice de son devoir, et si cette illégalité a fait tort au demandeur il en est responsable. "La loi, a dit Bertrand de Greville, "ne peut balancer entre celui qui se trompe "et celui qui souffre."

Cette doctrine est soutenue par Toullier, vol. 11, p. 203, 204 et 251; Larombière, vol. 5, p. 695, No. 15; Domat, Pothier.

Elle a été aussi sanctionnée par la Cour d'appel dans une cause de *Montizambert & Talbot*, rapportée au 10ème vol., L. C. R., p. 269.

Mais cette responsabilité du défendeur ne peut être invoquée contre lui que dans le cas où les dommages soufferts résulteraient de son fait. Or la preuve du demandeur fait défaut sous ce rapport. Il résulte au contraire des faits prouvés et des documents produits dans la cause que l'absence de jurés légalement assignés n'a pas empêché le demandeur de procéder, et que ses procédures mêmes ont rendu la présence de petits jurés inutile.

Jugement:—"Considérant que le demandeur n'a pas prouvé les allégués essentiels de son action, et notamment qu'il ait encouru inutilement les frais qu'il réclame, par le fait et la faute du défendeur; que si le demandeur n'a pas subi son procès devant la C. B. R. il n'est pas établi que ce soit à raison de l'illégalité et de l'annulation des listes des jurés et du tableau des petits jurés, mais plutôt à raison de son application pour substituer un plaidoyer *in abatement* à son plaidoyer de non-coupable, et de la prise en considération de ce plaidoyer par la Cour;

"Considérant que le défendeur a prouvé les allégués essentiels de son exception, la déclare bien fondée, et renvoie l'action du demandeur, avec dépens."

COUNTY COURT.

ST. CATHARINES, Dec. 31, 1888.

Before E. J. SENKLER, Judge County Court,
Co. Lincoln.

CANADIAN PACIFIC R. Co., appellant, and City
of St. CATHARINES, respondent.

*Taxation—Personal property of company used
in telegraph office not subject to taxation.*

Appeal from the decision of the Court of
Revision for the City of St. Catharines for
1888, to the Judge of the County Court of the
County of Lincoln.

PER CURIAM:—The assessment complained
of is entered in the assessment for the City
of St. Catharines for 1888, as follows:—

"Canadian Pacific Telegraph Office, T.—
Richard Fitzgerald, T.—\$1,400 Real property
—\$400 Personal property," and the complaint
is as to the personal property only.

The contention of the appellants is that no
such corporation exists as the Canadian
Pacific Telegraph Company; that the office
of which the real property assessed consists
and in which the personal property assessed,
is said to be situate (such personal property,
consisting of furniture and instruments used
in telegraphing), is rented by the Canadian
Pacific Railway Company, which has con-
structed a telegraph line along the line of its
railway, and has also constructed other
telegraph lines connecting St. Catharines
and other places with the telegraph line
along the railway, as that railway company
is authorized to do by section 16 of its
charter (44 Vict. ch. 1); that the business at
the office in question is carried on by the
Canadian Pacific Railway Company under
this section, and cannot be distinguished
from the general business of the company;
that under the Assessment Act, R. S. of O.
(1887), cap. 193, sect. 34, sub-sect. 2, the
personal property of the Canadian Pacific
Railway Company is exempt from assess-
ment, the shareholders being liable to
assessment on the income derived from the
Company.

Mr. McDonald, the City Solicitor, hardly
disputed the correctness of this reasoning,
and after considering the Statutes referred to
I think it is sound.

The Canadian Pacific Railway Company

has invested the principal part of its means
in the railway within the meaning of the
second sub-section of the Assessment Act
above referred to; the telegraph lines are of
secondary importance.

I therefore grant the appeal and strike off
the assessment of \$400 for personal property.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER III.

OF INSURABLE INTEREST, THE SUBJECT INSURED,
AND WHO MAY BECOME INSURED.

[Continued from p. 192.]

§ 61. *Prospective earnings, or profits.*

One having an insurable interest in prop-
erty may also insure the prospective earnings
or profits likely to grow out of that property.
Of this nature is the frequent case of insur-
ance on freight. It is necessary, however,
that such interest should be insured specifi-
cally as such.¹

In England and the United States, even
inchoate interests arising from executory
contracts of sale, and expectancies founded
on subsisting titles, like profits and freight,
have been frequently held insurable inter-
ests.²

As to profits, or freight, the French law in
force in Lower Canada allows them to be in-
sured.³

§ 62. *Insurance of expected increase in value.*

If there be an insurance on goods, the pre-
sent value of which is £5,000, but it is ex-
pected that the value will rise, and an insur-
ance is therefore effected for £8,000 in case of
the value rising afterwards, and the goods
being burnt when worth that: Cannot that
increased value be claimed, though the real
cash value at the date of the policy was only
£5,000? Apparently it could. But suppose
the goods at the date of the fire be worth

¹ *Abbott v. Schor*, 3 Johns Cas. 39; *Barclay v. Cousins*, 2 East, 544.

² *Columbia Ins. Co. v. Lawrence*, 2 Peters 151; *McGivney v. Fire Ins. Co.*, 1 Wend. 85; *Etna Fire Ins. Co. v. Tyler*, 12 Wend. 507; 16 id. 385; *Hancox v. Fishing Ins. Co.*, 3 Sumner 132; *Barclay v. Cousins*, 2 E. R.

³ Art. 2493, C.C.

only £4,000, the insured cannot recover more than £4,000.¹

§ 63. *Insurance on thing not in existence, or not yet acquired.*

Goods not in existence at the date of the insurance, but meant to be, or to be acquired afterwards, may be the subject of insurance.

A policy covering for twelve months goods in a shop covers to the extent of the sum insured, any goods of the insured put into the shop and lost by fire within the twelve months.

In the case of *B. A. Ins. Co. v. Joseph*,² Joseph insured "Household and smith's coals contained in" a certain yard, for twelve months, for £1,000. No quantity was mentioned. At the date of the policy only 500 chaldrons were contained in the yard. These were added to. Afterwards, from spontaneous combustion 853 chaldrons were burnt. The insurance company, sued by Joseph, pleaded that the original 500 chaldrons remained unburnt, and that the fire had been caused by the other coals, uninsured, having been placed there wet.

The courts held that the policy covered the coals at the date of it in the yard, and the others that Joseph afterwards put there.

¹ The following is an extract from a communication which appeared in the *London Times*:—"I beg to call attention to a more injurious step taken by the leading fire insurance offices in London. It is a clause lately inserted in their fire policies, by which, no matter the amount insured and the premium paid, the offices are not answerable to more than the market value of the goods previous to the fire. Now, Sir, to show how injurious such a clause is to merchants or consignees, suppose my correspondent ships me grain to the value of £25,000, which I warehouse and insure. The market being depressed, I am instructed to hold till the market recovers to the value insured: but a fire occurs at a moment when wheat, instead of being worth 60s., is only worth 40s. The insurance company, according to this clause, pays me but £16,666, although they have received premium on £25,000. I am, therefore, a loser of £8,333, which must either fall on my correspondent or on me; while, if the market rises and the value be, say £30,000, the insurance company only pays on the amount insured." But is he a loser? If there had been no fire, and he had held the grain, might it not have fallen to £10,000? Besides, he is not a loser, for with £16,666 he can buy that quantity of grain then and there.

² 9 L.C. Reports.

§ 64. *Loss before date of contract—French authorities.*

Where the thing is lost before the contract is made, the insurance is null according to Pothier, Ass. No. 11, the same as a sale is null if the thing have perished. But under 365 C. de Com., conformable to Art. 38 des Assurances de l'Ord. de 1681, marine assurance made in good faith in ignorance of the loss of goods, or ship, at a distance, is valid; so says Massé, Nos. 1554, 1555, Dr. Com. But in fire assurance, Massé says such insurance is radically null.

In the case of *Folsom v. The Merc. Mut. Ins. Co.*¹ a contract of insurance was made on a schooner called *B. F. Folsom*, March 1st, the words "lost or not lost" not in the policy. The risk was taken from January 1 preceding to January 1 following. The inception of the contract was 1st January, 1869. The vessel was in existence then; but on 1st March it was not; but both parties were in ignorance of the fact that the vessel did not then exist. On the 13th January, 1869, the vessel insured became disabled at sea, and afterwards was abandoned and totally lost. Before the plaintiff insured he had seen a report that the *Orlando* was lost, but said nothing, though he knew a man named *Orlando* was master of the vessel insured. The insured recovered.

Strickland v. Turner is cited by Bunyon against my text; it ruled as per Pothier, Ass. No. 11, for sale of a thing lost before it was sold; but Pothier, No. 12, is express that this sales doctrine is not to be applied in insurance.

In *Strickland v. Turner*, 7 W. H. & Gordon, an annuity payable during his life to A, was sold by A's agent to B, who paid. At the time of the sale A was dead. His agent and the purchaser were ignorant of this. The purchaser got nothing. There was total absence of consideration to him; so he got back his money paid.

In a case of *Security F. Ins. Co. v. Kentucky Mar. & F. Ins. Co.* (A.D. 1869), it was held that where the property insured is distant and its status unknown, the insurer must pay for a loss that occurred before the date of the contract (in fire as in marine insurance).²

¹ 8 Blatchford's Rep.

² It is better to say "lost or not lost;" yet circumstances may imply that, as was held in the above case.

In the case of *Paddock v. The Franklin Ins. Co.*¹, it was held that insurance on goods "lost or not lost," will cover any loss which arises after the period fixed for the inception of the risk, though prior to the execution of the policy.

§ 65. *Subject insured—Knowledge of loss.*

Though it might be supposed that the subject insured must exist at the date of the insurance, if the subject have ceased to exist before it was made the object of insurance, the insurance is not null, nor is the premium paid to be returned if the insured did not know and could not have known of its loss before the insurance.

Under the Ordonnance of 1681, insurance might validly be effected in such case, where the insured did not know of the loss.

Massé, *Droit Comm.*, No. 1555, says: Even where there is good faith, *assurance terrestre* is absolutely null if made on a thing which has ceased to exist, and he cites Quénault.

Our Lower Canada Civil Code, Art. 2480, requires that an interest must exist at the time of the insurance.

In France the thing must exist in *assurance terrestre*; but ships are frequently insured "*sur bonnes ou mauvaises nouvelles*" equivalent to "lost or not lost"; but this last expression has for effect only to throw more proof on the insurers. If the insured had knowledge of the loss his policy (even with these words) is void, and so in England.

In Scotland, insurance of a house at a distance, in belief of its being extant, is effectual. No. 458, Bell's Pr.

In 2 Saunders' R., 201, d. note, it is said that insurance on a ship is null if she be lost before the insurance was effected, unless the words "lost or not lost" be in the policy; and the insured will not recover, though these words be in the policy, if he knew that the ship was lost. Where the belief of both parties was that she was extant, the insurance is effectual, and so of a house at a distance. In the Heligoland case, *post*, the subject insured was lost before insurance was effected upon it, but both parties were ignorant of this, so this could not have been made by the insurers reason for not paying.

¹ 11 Fisk. So also, *Sutherland v. Pratt*, 11 Mees. & W.

Knowledge of loss will be supposed, where the loss of the object has been announced in a newspaper taken in by the insured. An analogous case is put in Pothier (*Assurance*), No. 25.

3 Kent. Some hold a ship policy void if the ship be lost before the insurance, unless the words "lost or not lost" be in the policy. Judge Story does not so hold, so (*semble*) he would allow to be valid insurance of a house, without the words "lost or not lost," if all be *bona fide*.

§ 66. *Concealment of loss by agent from his principal.*

In *Proudfoot v. Montefiore*¹ a question of considerable importance was discussed. Insurance was effected on a cargo of madder from Smyrna, when the ship was already lost. The fact of the loss was known to the agent of the insured, but he purposely withheld information of it from his principal in order that insurance might be effected by the latter. The Court held the insurance to be void on the ground that the concealment of the loss by the agent was fraudulent, and his employer should suffer for it.

Insurance may be effected on a house at a distance. This may have an effect on notice of loss, the time for it, and the right of the insured to recover.

§ 67. *Insurance of commissions by consignee.*

The commissions expected on a consignment seem to be a good insurable interest.² "On commission of the plaintiff as consignee of the cargo of ship, valued the commission at £1,500." This would describe a good insurable interest.³ But for condition against it, frequently a consignee in possession of goods, though the goods of the consignor, may insure them in his own name. The lawful possession would give him an insurable interest, and if he were to insure generally all the goods in a store described, the policy would cover his own goods and those deposited there of which he is consignee only.⁴

¹ Queen's Bench (Eng.) June 15, 1867.

² *Flint v. Lencourier*, Park, 5 268.

³ *Barclay v. Cousins*, 2 East, 544; *Brisban v. Boyd*, 4 Paige.

⁴ *De Forest v. Fulton Fire Ins. Co.*, Hall, 84.

APPEAL REGISTER—MONTREAL.

Thursday, June 19, 1890.

Montreal Loan & Mortgage Co. & Leclair.—Affirmed.*Canadian Pacific R. Co. & Robinson.*—Affirmed.*Bonneau & Circé.*—Affirmed.*Palliser & Lindsay.*—Affirmed.*Moodie & Jones.*—Affirmed, Tessier, J. dissenting.*Bergevin & Taschereau & Masson.*—Affirmed.*Lamoureux & Dupras.*—Affirmed.*Sherbrooke Telephone Association & City of Sherbrooke.*—Affirmed.*Michon & Leduc.*—Affirmed.*Perrillier dit Lachapelle & Brunet et ux.*—Affirmed.*Hurdman et al. & Thomson.*—Motion for leave to appeal.—Continued to next term.

The Court adjourned to Sept. 15.

EXTRADITION BETWEEN GREAT BRITAIN AND THE UNITED STATES.

The following Order in Council, published in the *London Gazette* of March 25, 1890, appears in the *Canada Gazette*, June 14, 1890:—

AT THE COURT AT WINDSOR,

The 21st day of March, 1890.

PRESENT :

The QUEEN'S Most Excellent Majesty.

Lord President,
Duke of Rutland,
Lord Chamberlain,

Earl of Coventry,
Sir William Field.

Whereas by the Extradition Acts 1870 and 1873, it was amongst other things enacted that, where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that the said Acts shall apply in the case of such foreign State; and that Her Majesty may, by the same or any subsequent Order, limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's Dominions specified in the Order, and render the

operation thereof subject to such conditions, exceptions and qualifications as may be deemed expedient; and that if, by any law made after the passing of the Act of 1870 by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying the said Acts in the case of any foreign State, or by any subsequent Order, suspend the operation within any such British possession of the said Acts, or of any part thereof, so far as it relates to such foreign State, and so long as such law continues in force there, and no longer.

And whereas by an Act of the Parliament of Canada passed in 1886, and intituled "An Act respecting the Extradition of Fugitive Criminals," provision is made for carrying into effect within the Dominion the surrender of fugitive criminals:

And whereas by an Order of Her Majesty the Queen in Council, dated the 17th day of November, 1888, it was directed that the operation of the Extradition Acts 1870 and 1873 should be suspended within the Dominion of Canada so long as the provision of the said Act of the Parliament of Canada of 1886 should continue in force and no longer:

And whereas a Convention was concluded on the 12th day of July, 1889, between Her Majesty and the United States of America for the mutual extradition of fugitive criminals, which Convention is in the terms following:—

"Whereas by the Xth Article of the Treaty concluded between Her Britannic Majesty and the United States of America on the 9th day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

"And whereas it is now desired by the high contracting parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention;

"The said high contracting parties have appointed as their plenipotentiaries to con-

clude a Convention for this purpose, that is to say:—

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland: Sir Julian Pauncefote, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Honorable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States;

"And the President of the United States of America: James G. Blaine, Secretary of State of the United States;

"Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles:—

"ARTICLE I.

"The provisions of the said Xth Article are hereby made applicable to the following additional crimes:—

"1. Manslaughter when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; housebreaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offences against the laws of both countries, for the suppression of slavery and slave trading.

"Extradition is also to take place for participation in any of the crimes mentioned

in this Convention or in the aforesaid Xth Article, provided such participation be punishable by the laws of both countries.

"ARTICLE II.

"A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

"No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offence, or for any act connected therewith, committed previously to his extradition.

"If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the Government in whose jurisdiction the fugitive shall be at the time shall be final.

"ARTICLE III.

"No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

"ARTICLE IV.

"All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, whether being the proceeds of the crime or offence charged, or being material as evidence in making proof of the crime or offence, shall, so far as practicable, and if the competent authority of the State applied to for the extradition has ordered the delivery thereof, be given up when the extradition takes place. Nevertheless, the rights of third parties with regard to the articles aforesaid shall be duly respected.

"ARTICLE V.

"If the individual claimed by one of the two high contracting parties, in pursuance of the present Convention, should also be claimed by one or several other Powers on

account of crimes or offences committed within their respective jurisdictions, his extradition shall be granted to that State whose demand is first received.

"The provisions of this Article, and also of Articles II to IV inclusive, of the present Convention, shall apply to surrender for offences specified in the aforesaid Xth Article, as well as to surrender for offences specified in this Convention.

"ARTICLE VI.

"The extradition of fugitives under the provisions of this Convention and of the said Xth Article shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

"ARTICLE VII.

"The provisions of the said Xth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

"In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction, and of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

"ARTICLE VIII.

"The present Convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date at which the Convention shall come into force.

"ARTICLE IX.

"This Convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

"It shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the high contracting parties, and shall continue in force until one or the other of the high contracting parties shall signify its wish to terminate it, and no longer.

"In witness whereof, the undersigned have signed the same, and have affixed thereto their seals.

"Done in duplicate, at the City of Washington, this 12th day of July, 1889.

"(L.S.) JULIAN PAUNCEFOTE.

"(L.S.) JAMES G. BLAINE."

And whereas the ratifications of the said Convention were exchanged at London on the 11th day of March, 1890.

Now, therefore, Her Majesty, by and with the advice of Her Privy Council, and in virtue of the authority committed to Her by the said recited Acts, doth order, and it is hereby ordered, that from and after the 4th day of April, 1890, the said Acts shall apply in the case of the United States of America, and of the said Convention with the United States of America.

Provided always, and it is hereby further ordered, that the operation of the said Extradition Acts, 1870 and 1873, shall be suspended within the Dominion of Canada so far as relates to the United States of America and to the said Convention, and so long as the provisions of the Canadian Act aforesaid of 1886 continue in force, and no longer.

C. L. PEEL.

GENERAL NOTES.

JUDGE LYNCH AHEAD.—A record has been made of the murders committed in the United States for six years past, and the total is 14,770. For these 558 persons have suffered death in accordance with the provisions of the law. Nine hundred and seventy-five, however, have met their fate at the hands of Judge Lynch. If the latter statement be an index to public opinion, the abolition of capital punishment would be somewhat premature.

FIRE INSURANCE.—What is a fire? is the question which a Paris Court was recently called upon to decide. The Countess Fitzjames had had all her effects insured by the Union Fire Insurance Company for 685,000 francs. In the list of jewels covered by the policy was a pair of pearl earrings valued at 18,000 francs and insured for 10,000. One afternoon, while dressing, the Countess knocked the earrings accidentally from the mantelpiece into the open fire. Despite her strenuous efforts with shovel and tongs the jewels were destroyed. She recovered the gold, valued at 60 francs, and demanded from the company 9,940 francs indemnity for the loss of the pearls. The company refused to pay on the ground that the ordinary grate fire was not the kind of a fire contemplated in the insurance policy. The Countess appealed to the Courts and got a decision in her favor. The judge held that "an insurance against fire was an insurance against all kinds of fire—that was, insurance against any loss caused by any flames."—*Kz.*

The Legal News.

VOL. XIII. JUNE 28, 1890. No. 26.

The announcement has been made that the person who attempted to murder County Judge Bristowe, at Nottingham station, some time ago, has committed suicide. It is curious that the only successful attempt in England to murder a judicial officer ended in the same way. In *Monro's Acta Cancellariæ* there is to be found (No. clix., p. 236) a certificate, dated Nov. 4, 1616, made in the case of *Bartram v. Symeon*, by Sir John Tyndal and Sir John Amye, with an endorsement thereon respecting the murder of Sir John Tyndal, who was a Master in Chancery. The endorsement says: "For making this report Sir John Tyndal was killed by Bartram, the plaintiff, 12th November, 1616." Bartram shot him dead in Lincoln's Inn, and afterwards escaped execution by hanging himself in prison. The assailant of Mr. Justice Field, of the United States Supreme Court, was shot dead in the act of committing the assault. The assailant of Chief Justice Austin, of the Bahamas, received thirty lashes. Examples of attacks on judges are rare, and the assailants seem to fare badly; so it may be hoped that such assaults will wholly cease.

The London *Law Journal* notes the fact that the question of capital punishment has been twice carefully considered in England within the last fifty years; first, by a select committee of the House of Lords in 1847, which reported that "almost all witnesses and all authorities agree in opinion that for offences of the gravest kind the punishment of death ought to be retained;" secondly, in 1865-66, by a royal commission presided over by the Duke of Richmond, which, though "forbearing to enter into the abstract question of the expediency of abolishing or maintaining capital punishment, on which subject differences existed between them," recommended "that the punishment of death be retained for all murders deliberately committed with express malice aforethought, such

malice to be found as a fact by the jury," and also for all murders committed in the perpetration of arson, burglary, and other serious felonies. Four out of the twelve commissioners (Dr. Lushington, Mr. Bright, Mr. Neate and Mr. Ewart) signed a declaration to the effect that "capital punishment might safely and with advantage to the community be abolished," while a fifth, Mr. Justice O'Hagan, would have signed it but that he doubted whether public opinion in the country was yet ripe for the acceptance of such a change. Amongst the witnesses examined (who in point of number were evenly balanced), Lord Bramwell, Colonel Henderson, Sir George Grey and Mr. Davis, the ordinary of Newgate, were of opinion that capital punishment has a strongly deterrent effect, while Mr. Justice Denman thought that, on the whole, more was done by capital punishment *as it then existed* (i.e., before the abolition of public executions) to induce murders than to prevent them; the late Chief Baron Kelly thought that the most severe secondary punishment that could be devised would be equally deterrent; and Lord S. G. Osborne believed that where murders proceed from strong provocation, "no fear of death, not even if the rack should precede it, would have power to deter it." Mr. Davis made the important statement that, in his opinion, warders would be in danger, in watching over criminals under penal servitude for life, if capital punishment were abolished.

COUR SUPÉRIEURE.

DIST. DE SAGUENAY, 13 NOV. 1889.

Coram ROUTHIER, J.

ROY v. DUBERGIER, et FILION, Tiers-opposant.
Séparation de biens — Assignation — Tierce-opposition.

JUGÉ:—10. *Que le reçu copie donné par le défendeur pour tenir lieu de la signification de l'action, et dispensant la demanderesse des formalités de l'assignation, et le défaut de rapporter l'action au jour fixé pour le rapport, rendent irrégulier et nul, le jugement prononçant la séparation de biens ainsi que toutes les procédures subséquentes s'y rapportant.*

20. *Que le tiers-oppoſant, créancier du défendeur, n'ayant pas été partie ni appelé à l'instance, avait le droit de se pourvoir par tierce-oppoſition.*

JUGEMENT :—"Considérant que le tiers-oppoſant a prouvé les allégués eſſentiels de ſon oppoſition faite en cette cauſe ;

"Considérant qu'il eſt un des créanciers de Georges DuBerger, défendeur en cette cauſe, et que ſes intérêts comme tel créancier ſont affectés par le jugement en ſéparation de biens rendu dans la préſente cauſe en faveur de la demandeſſe contre le défendeur ſon mari, dans laquelle inſtance le dit tiers-oppoſant n'a été partie ni appelé ;

"Considérant que l'action en ſéparation de biens inſtituée en cette cauſe par la demandeſſe n'a pas été ſignifiée légalement ſur le défendeur, ni rapportée régulièrement en Cour, au jour fixé pour ſon rapport, et que le défendeur, par collusion avec la demandeſſe, a diſpensé cette dernière de toutes les formalités de l'assignation, exigées par les articles 75, 76, 77 et 78 du C. P. C., contrairement aux articles 974 et 976 du même Code ;

"Considérant qu'à l'époque de la dite action, le défendeur était notoirement en faillite et avait fait ceſſion de ſes biens, et que la ſéparation de biens obtenue ſubſéquentement par la demandeſſe, en vertu des procédures illégales ſus-dites, paraît avoir été prononcée pour ſuſoriser la demandeſſe, au détriment des créanciers de ſon mari dont le tiers-oppoſant eſt un, et en fraude de leurs droits ;

"Considérant que les droits matrimoniaux de la demandeſſe n'ont pas été régulièrement établis, et que le jugement de ſéparation n'a pas été régulièrement exécuté, ce qui n'empêche pas la demandeſſe de conteſter le bilan du failli, et demander à être colloquée par privilège pour quatre mille ſix cents piâſtres ſur le produit des biens de ſon mari, maintenant la dite oppoſition du tiers-oppoſant, déclare nul et de nul effet le jugement de ſéparation de biens obtenu en cette cauſe par la demandeſſe et les procédures ſubſéquentes auxquelles le dit jugement ſert de baſe—le tout avec dépens."

Confirmé par la Cour de Réviſion à Québec le 28 février 1890,

Angers & Martin, procureurs du tiers-oppoſant.

J. S. Perrault, procureur de la demandeſſe.

(C. A.)

SUPERIOR COURT.

AYLMER, June 4, 1890.

Coram MALHIOT, J.

Ex parte BANK OF MONTREAL v. O'HAGAN.

Foreign Court—Jurisdiction.

HELD :—"That to give a judgment, rendered by default in the courts of another province, extra territorial effect, it muſt be ſhewn, either that the defendant poſſeſſed property in ſuch other province at the time that the action was brought, or that he was ſerved perſonally therein.

The action was baſed upon defendant's two promiſſory notes amounting to the ſum of \$171, the plaintiff alſo ſetting up an exemplification of judgment on the notes obtained by default in the County Court of the County of Carleton, in the Province of Ontario, with coſts taxed at the ſum of \$30.

It was ſubmitted by plaintiff's attorney that the plaintiff could not be reſuſed theſe coſts. The exemplification was in accordance with ſub-ſection 1 of Art. 1220, C. C. It is true that by it, it does not appear that the defendant was ſerved perſonally within the Province of Ontario, and Art. 42 b, C. C. P., conſequently does not apply ; but the defendant made and dated the notes, and made them payable in the County of Carleton ; and by ſo doing accepted the jurisdiction of the courts of that place. Our own law would permit of theſe notes being ſued there ; and the law of Ontario, in the abſence of proof to the contrary, muſt be preſumed to be ſimilar. The R. S. Ont., 1887, Vol. I, ch. 47, Arts. 2, 19 and 55, ſhow the conſtitution and jurisdiction of the Court and its power to award coſts. Theſe coſts form part of the preſent demand, and are not within the diſcretion of this tribunal.

The Court, after giving judgment for the amount of the notes, rejected the ſurplus of the demand for the following reaſons :

"Et considérant qu'il n'appert pas que lors du jugement rendu contre le dit défendeur en faveur de la demanderesse, dans la Cour du Comté de Carleton dans la Province d'Ontario en date du six de février dernier, que le défendeur résida dans la dite Province d'Ontario, ou que la dite Cour du Comté de Carleton ait eu aucune juridiction sur le dit J. C. O'Hagan, qui réside dans la Province de Québec ;

"Considérant, en outre, que rien ne fait voir que le dit défendeur eut des biens dans la dite Province d'Ontario lors de l'institution des procédés dans la dite province et la reddition du dit jugement, et que les dits procédés ne paraissent avoir eu d'autre but que celui de multiplier les frais contre le dit défendeur, pratique abusive et qui doit être découragée ; la Cour rejette cette partie de la demande qui a trait aux frais de la poursuite faite dans la Province d'Ontario, et condamne le défendeur aux dépens de cette cause comme dans une cause de \$181, dont distraction, etc."

Brooke & McConnell for plaintiff.

J. R. Fleming for defendant.

(C. J. B.)

PROBATE, DIVORCE AND ADMIRALTY.

LONDON, June 10, 1890.

IN THE GOODS OF RHODA SLINN, deceased.

Testamentary Paper—Deed of Gift admitted to Probate.

This was a motion for a grant of administration with the will annexed to Elizabeth Walker of the following document :—

"To all people to whom these presents may come, I, Rhoda Slinn, do send greeting. Know ye that the said Rhoda Slinn, of 3 House, 3 Court, West John Street, in the parish of Sheffield, in the West Riding of the county of York, widow, for and in consideration of the love, goodwill, and affection which I have and do bear towards my loving friend, Elizabeth Walker, wife of Joseph Walker, of 5 Garden Street, of the same parish and county, file cutter, have given and granted and by these presents do freely give and grant unto the said Elizabeth Walker, her heirs, executors, or administrators, the

moneys invested in my name in the Sheffield Savings Bank, Norfolk Street, in the parish of Sheffield aforesaid, to have and to hold as her or their own without any manner of condition.

"In witness whereof I have hereunto put my hand and seal this 12th day of October 1889.

her

"Rhoda X Slinn.

mark.

"Signed, sealed, and delivered, in the presence of us and in the presence of each other,

"George Stuart.

"George Markley."

Rhoda Slinn died November 3, 1889. There was evidence that she had intended to make a will, but that she had been led to believe that a deed of gift would be cheaper. There was also evidence that at the time the deed of gift above set out was executed she said she wished a certain person in America to have £10.

Middleton, for the applicant, cited *Cock v. Cooke*, 1 P. & D. 241; *Robertson v. Smith*, 39 Law J. Rep. P. & M. 41; 2 P. & D. 43; *In the Goods of Coles*, 2 P. & D. 362. Apart from other evidence, the expression as to the person in America shows that the deceased did not intend the deed to operate until after her death.

The PRESIDENT: I am clearly of opinion that this paper ought to be admitted to probate. It is clear that extrinsic evidence may be admitted to explain an ambiguous paper of this kind, as there is always an inherent improbability that the person executing it intended the property to go away from him or her in his or her lifetime. In this case, as in the others that have been cited, the expressions are wholly inconsistent with an out-and-out gift. In *Robertson v. Smith* there was an expression of a wish that a certain person should have £50. In this case there is a reference to another person, and an expression of a wish that that person should have £10 if there was enough left. I am of opinion that this paper is testamentary, and I grant probate of it accordingly.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER III.

OF INSURABLE INTEREST, THE SUBJECT INSURED,
AND WHO MAY BECOME INSURED.

[Continued from p. 197.]

§ 68. Interest of mortgagor and mortgagee.

In the United States a mortgagor of property retains an insurable interest therein, so long as his right of redemption continues.¹

In Lower Canada where a mortgagor always retains his property and the fee of it, *a fortiori* may he insure; the mortgagee also may insure, as mortgagee.²

But suppose the lender of money to insist on a sale *à faculté de réméré*, can A, seller with *faculté de réméré*, insure? Yes, he can insure his reversionary interest.

In Massachusetts it has been held that the mortgagor's insurable interest will not be affected by the fact that the mortgage equals or exceeds the value of the property.³

Certainly it would not be affected in Lower Canada.⁴

A mortgagee can't be referred to the land mortgaged as continuing to offer ample security for the debt. It is in vain to say that the mortgagee has not been damnified. The mortgagee can't, recovering the insurance money, go afterwards and make the mortgagor pay him the debt amount, but the mortgage securities must be transferred to the insurers; and if the mortgagee at the time of the insurance be under incapacity to make such a transfer and subrogation, he ought to

disclose that fact, else he is guilty of concealment.⁵

Duer says: There is no case in which after payment to mortgagee by the insurers, the mortgagee will be allowed to enforce for his own benefit payment from the mortgagor of the original debt.

A person may, in the province of Quebec, insure his property however much mortgaged.

A mortgagor insures a house, insurance payable to mortgagee in case of loss. The mortgagor's interest is insured so, with power to mortgagee to get the money. In case of loss the insurers have to pay whether the mortgage debt be paid or not.

If the debt be not paid the insurance money may pay it. If paid, then the mortgagee takes the money as a trustee; it was made over to him for a purpose accomplished, he must account to the mortgagor for it. (So held in King case, 1850. Mass.)

Mortgage creditors in Quebec often insure their debtor's houses mortgaged. The insurer in such case is a kind of surety, though a conditional one, for the debt. If the property be not burned in a given time he is free; again, if the property be burned the insurer may go free if the insured have lost nothing. If he could never have been paid had the fire not happened (owing to

¹ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Traders' Ins. Co. v. Robert*, 9 Wend. 404.

² A mortgagor may generally insure and recover to the full value of the property. *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40.

³ *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249.

⁴ In *O'Neill v. Ottawa Agricultural Ins. Co.*, 30 C. P. Rep., Ontario, there was a condition: Interest if "changed in any manner, whether by act of insured or by operation of law, policy to be void." The insured mortgaged the property, whereby his interest became changed. Held, that the policy was avoided. In this case the insured sold and conveyed by way of mortgage. Query, in Lower Canada, would giving a mortgage in Quebec form vacate such policy?

⁵ *Kernochan v. N. Y. Bowery F. Ins. Co.*, 5 Duer's Rep. (A.D. 1855). *Whyte* (assignee of Miller) *v. The Home Insurance Co.*, March 30, 1871, Court of Revision, Montreal. *The Columbian Insurance Co. v. Lawrence*, 2 Peters' R., was approved in 10 Peters, and on each occasion verdicts were set aside, for being against it; and if *Tyler v. Etna Ins. Co.*, and some Massachusetts cases be against 2 and 10 Peters, it is because of New York and Massachusetts being against the Supreme Court and the Western States jurisprudence. Held: Miller had an insurable interest from possession and the verbal bargain even as regards land that he had with his co-partner. His co-partner was dead, but letters from him were extant, and his widow, half owner as *commune*, proves verbal sale by her deceased husband. Verbal sale of land is good in Lower Canada; proof is difficult, that's all. Yet the Court of Revision would allow that if a tenant construct a house on the land leased, and it be removable by him under his lease from the landowner, if he insure that house as his (the insured's), the fact of the precarious holding of the insured must be disclosed, on the principle of the Columbian Insurance case, 2 Peters and 10 Peters.

the insufficiency of value of the property), the insured will not get paid. He must show that his *créance* might have been collocated *en ordre utile*.

It is best for the mortgage creditors to insure their mortgage claim.

§ 69. *The hypothecary claim must be secured by the property.*

A mortgage creditor insuring may sometimes not recover the amount insured; because of the existence of mortgages anterior to his, covering more than the value of the land and buildings mortgaged. A hypothecary right is often worth nothing. But insurers, to get free from paying an insured mortgage creditor's loss alleged, must prove clearly the valueless character of the insured's right of *hypothèque*, by proof of the value of the land and buildings mortgaged, and of the quantity of mortgage claims against it, anterior in date to the insured's. In *McGillivray v. Montreal Ass. Co.*, one of the judges said that where a mortgagee insures to secure his mortgage claim, it is necessary for him to show that his claim was worth something; for if anterior claims were undoubtedly larger than enough to eat up the whole value of the property insured then he could lose nothing by its destruction, and having lost nothing had no claim for indemnity, and so if, after a fire, enough value remains in the thing insured the mortgage creditor ought not to get the policy amount.

§ 70. *Insurance as security for loan.*

Insurance is often effected by an owner debtor as a security for a loan. The insured would do well to stipulate that the insurance is for the creditor if the debt be subsisting at the time of a fire happening, but for his own after the debt is paid. A borrows £100 from B and promises to insure for B's benefit. The insurers take the premium. The policy reads to secure B. Afterwards B is repaid by A, who, not examining the policy, is tranquil, and even pays a renewal premium. The house in-

sured is afterwards totally destroyed by fire. The insurers lose nothing.¹

§ 71. *Mortgage creditor insuring debtor's property.*

A mortgage creditor, in France, or in the province of Quebec, insuring his debtor's house, does not get the insurance money for himself, but as *negotiorum gestor* for the debtor's creditors generally. It is otherwise where he insures his mortgage debt claim.²

If a mortgage creditor insure his debtor's house, mortgaged, and afterwards the debtor, or representatives, pay part of the debt, the insurers are relieved *pro tanto*.

The mortgagor may insure, says Boudousquie, No. 33, p. 63, and the mortgagee too, the same property. The two contracts can receive execution without the inconveniences that some see; since the insurer who pays the creditor claimant insured is subrogated *de plein droit* into his rights of action against the debtor. If the creditor alone insure, the insurer paying him makes the debtor pay him, the insurer.

If the mortgagor have insured at one office and the mortgagee at another; if there be two different insurers, he who indemnifies the mortgagee creditor goes against the mortgagor debtor, and this debtor calls upon his own proper insurer, and the debtor finds the benefit of his insurance in his liberation; and the two insurances have not given place to double indemnity in respect of, or for, one and same object.

In France (Boudousquie, No. 33), a bad mortgage claim, or one that could never have been turned to account, owing to earlier mortgages, cannot be insured (*ordre utile* is required as a possibility). If the claim of the mortgagee could not be collocated *en*

¹ P. 310, Monthly Law Reporter of 1858, *contra*. Suppose, after a contract and insurance by the debtor in his own name, the policy be transferred to the mortgagee (loss to be paid to mortgagee), the mortgage is afterwards paid, then a fire takes place. There was a contract to insure. The obligations of the insurers (*ib. p. 310*) have not ceased.

² See Angell, § 60. It is said here: "But does he receive one and the same satisfaction for one debt." In France it would be said that he does. He would be held to receive his debt to the extent of his interest.

ordre utile according to the value of the thing when burned, the immovable never was a security to the insured nor can he recover. And this is said to be the law of Lower Canada, Aylwin, J., dissenting, in *Mont. Ass. Co. v. McGillivray*.¹

A chirographary creditor need hardly, so insure his debtor's house; for, says B, he can't insure his debtor's house in his own name, there is not "*matière d'assurance*," but he can insure it in the name of his debtor, and then on loss the indemnity will be distributed *par justice*; the insured is held *negotiorum gestor* of the debtor in making the insurance.

But the premium in such case can't be fastened on the debtor. And whereas the debtor may ratify and make the insurer pay, if loss happen, he may refuse, where all goes well and no fire occur, to ratify the *negotiorum gestor's* doings.

Angell, § 60a, says, a mortgagee who, at his own expense, insures his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest, is entitled, after fire and loss before payment of the mortgage debt, to recover the amount of the loss from the insurers to his own use, without assigning any part of his mortgage first to the insurers. He does not so receive two satisfactions, observed Shaw, Ch. J., in *King v. The State Mutual F. Ins. Co.*² A case of *Dobson v. Laud*,³ is referred to in Angell. It is doubtful whether this would be considered sound law in Quebec.

In the case of *Ex parte Andrews in re Emmett*,⁴ a right to £400 contingent on A's wife surviving her mother was assigned by A and wife to two creditors of A, upon trust, after payment of all debt and expenses, to pay the surplus to the transferors. The transferees insured the life of A's wife, without the knowledge of A or his wife. The wife died and A became bankrupt. Each of the transferees got £200 from the insurers; yet the transferees claimed against

the bankrupt's estate, without giving credit for anything. But they were ordered to give credit for what they had received. This would be so in Quebec.

In *Dobson v. Laud*, the authority of the above case was admitted; but the Vice-Chancellor distinguished that case from the one before him, on the ground that the latter, *Dobson v. Laud*, was the case of a common mortgage, while the other was the case of a trust. The mortgagee is not a trustee for the mortgagor to all intents and purposes, said the Vice-Chancellor. In Quebec, *semble*, this would not be held a sound case.

§ 72. Mortgagee must stipulate to have benefit of insurance.

A mortgagee stipulating that the mortgagor shall insure the mortgaged property, should stipulate that he is to have the benefit of the insurance; else, after a fire and assignment by the insured, the mortgagee will in vain notify the insurance company of claim by or for him.¹

§ 73. Insurance, loss payable to mortgagee.

Where an insurance is effected by A, "in case of fire the insurance money to be paid to C," a mortgage creditor of A, and A subsequently breaks a condition about other insurance and so avoids the policy, C can get nothing. The full rights in and to the policy were never C's; he was only appointed to have any money claims that A could possibly maintain.

¹ *Lees v. Whiteley*, 2 L. R., Eq. 143 (A.D. 1866).

G mortgaged to H, who transferred to appellant Wheeler et al. G had agreed to insure. Afterwards G authorized J & G, to whom also he owed, to insure, and they did by open policy in their names. A fire happened.

Held, that W. et al. had a lien after the claim of J & G against G was satisfied.

Wheeler, appellant, v. Factors and Traders Ins. Co., U. S. Sup. Court, 1879, Alb. L. J., 1880, p. 515.

The general rule is that the mortgagee has no right to the benefit of a policy taken by the mortgagor unless it is assigned to him. *Carter v. Rockett*, 8 Paige.

But if mortgagor agreed to insure for the mortgagee, the latter has an equitable lien on the money due on a policy taken by mortgagor. Angell, § 62.

¹ 8 L. C. R.

² 7 Cush.

³ 8 Hare; also in 7 Cush. It followed after *Ex parte Andrews in re Emmett*, 2 Rose.

⁴ 2 Rose.

Insurance by debtor of house, loss, if any, payable to mortgage creditor of insured. This is no insurance of the mortgage creditor's interest. *Flanders*, p. 441, approved. *Continental Ins. Co.*, appellant, & *Hulman*, respondent, Illinois, 1879; 34 Am. Rep. And an insured debtor might render unavailable the first policy by acts and deeds of his against its conditions. *Grosvenor v. Att. Ins. Co.*, approved, N. York. New York and Pennsylvania and Maine cases agree. *Black v. National*, 24 L. C. Jurist, is bad law.

§ 74. *Case where mortgagee's interest ceases.*

In Quebec, where a mortgage creditor insures the house (mortgaged) of his debtor, this is held not to be insurance of the house *per se*, but of the creditor's security; so that, though the house be burned, if, before the mortgagee sues the insurer, it have been rebuilt by the mortgagor, the mortgagee cannot recover as for loss by the fire. The rebuilding by the debtor is held to free the insurer from obligation to pay.

*Mathewson v. Western Ins. Co.*¹ was an action to recover £400, amount of a policy of fire insurance. In 1844, John Mathewson and wife sold a lot of land to C. P. Ladd, for a price in payment of which Ladd constituted a *rente* in favor of vendors of £80 per annum, for which the land was mortgaged. Ladd further bound himself to erect a house on the lot, of the value of £400, to insure it and to transfer the policy to the vendors as extra security till the *rente* should be redeemed. He did build, but never insured. Mathewson and wife assigned the *rente* to the plaintiff, who, in March, 1853, effected the insurance for £400 on which the action was brought. In June, 1853, the house insured was destroyed by fire. It was rebuilt, by Ladd, immediately, and before plaintiff commenced his suit. The defendants contended that they could not be held liable to pay; that plaintiff had suffered no loss, and that the rebuilding of the house before the institution of the action relieved them from liability. The Court held that an insured must be under loss at the time his action is brought

(argument from *Hamilton v. Mendes*, 2 Burr.); that in the present case plaintiff's security was as good as it had been before the fire; that he had suffered no loss; and that, under the circumstances, the action was to be dismissed. The Court cited also, in support of its judgment, from *Parsons Merc. Law*, p. 509: "The mortgagee has an interest only equal to his debt, and founded upon it; and if the debt be paid the interest ceases, and the policy is discharged. And if a house insured by a mortgagee were damaged by fire, even considerably, or perhaps destroyed, it might be doubted, on what we should think good grounds, whether he could recover, if it were proved that the remaining value of the premises mortgaged was certainly more than sufficient to secure his debt and all possible charges."

With respect to this case, it may be remarked that the rebuilding was performed by the debtor; it might have been done, at his request, by third persons, builders, and for credit, these persons observing formalities of the law of Lower Canada, and so securing privilege for their outlay. Had this been the case the insurance company would have been condemned in favor of Mathewson no doubt.

Mathewson, when he insured, had security, by the land and by the building. Had Ladd not rebuilt, it would have been going far to say that the insurer was not liable, on plea that the land was worth the sum insured. It might not continue to be so. It might perish, yet the *rente* continue to be payable, and Ladd might be utterly bankrupt. The intention of both insurer and insured might fairly be supposed to have been that if the house as a security for the debt disappeared the insurer would pay.

A insures to the extent of £400 a house, and transfers the policy to B, who holds a mortgage on it for £400. Fire happens afterwards, and A files all particulars, showing a loss of £500. B afterwards settles with the insurers and discharges them, for £200 paid. A complains, and may, justly; if A and B were creditors of thing *commune*, and B made remission of part, he would be held to indemnify his associate for the hurt caused

¹ 4 L. C. Jurist.

him by the *remise*. Duranton, Tom. xi., p. 190.

§ 75. *Limitation of interest.*

The interest of a mortgagee, pledgee, or anyone having a lien upon property, is limited to the amount of his lien.¹

§ 76. *Insurable interest continuing after mortgagor has sold property.*

In Massachusetts it has been held that a mortgagor of property to secure a debt due from him will continue to have an insurable interest therein, even after he has sold the property subject to the mortgage.²

It is so in Lower Canada. A mortgagor constantly sells property in Lower Canada charging the purchaser to pay off the mortgage debts, and balance to him. Such seller (mortgagor originally) may insure; he plainly has interest; his vendee may become bankrupt, buildings on the land may be burned.

It has been held in Massachusetts, that where one makes an assignment of his property for the benefit of creditors, he continues to have an insurable interest in the property assigned, unless it is made a condition of the assignment, that all the debts shall be released, and even then, if it can be shown that there is or probably will be a surplus remaining after paying all the debts.³

A mortgagee cannot, unless by agreement, charge the mortgagor premiums he pays for insurance.⁴

§ 77. *Insurance by mortgage creditor.*

There is a great advantage in the mortgage creditor taking a policy for himself. Where the assured takes the policy and merely transfers the amount of the loss, the creditor may have many things opposed to him, in case of loss.

At the making of a mortgage, the mortgagor may say that the mortgagee may

cause insurance to be effected on the property at the expense of the mortgagor, and that the premiums shall be added to the principal and interest as the debt to be paid on redemption. Then, if loss happen before the debt is paid, the sum payable to the mortgagee is the proceeds of a security furnished by the mortgagor, and it goes towards paying the debt.

[To be continued.]

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, June 21.

Judicial Abandonments.

Paradis & Co., traders, Roberval.
Percy J. Thompson, doing business under name of Henderson Manufacturing Co., Montreal, June 6.

Curators appointed.

Re Vital Côté, hotel-keeper, Plessisville. — A. Quesnel, Arthabaskaville, curator, June 13.
Re Joseph E. Beauchemin, Nicolet. — C. A. Sylvestre, Nicolet, curator, June 13.
Re Louis Despocas, Valleyfield. — Kent & Turcotte, Montreal, joint curator, June 7.
Julien Hébert et al., Ste. Martine. — Kent & Turcotte, Montreal, joint curator, June 13.
Re Cléophas M. Lavigne. — C. Desmarceau, Montreal, curator, June 10.
Re John C. Lawrence. — John Caldwell, Montreal, curator, June 14.
Re Henderson Manufacturing Co. — A. F. Riddell, Montreal, curator, June 13.
Re Machinery Supply Association, Montreal. — A. W. Stevenson, Montreal, curator, June 19.

Dividends.

Re Elodie Côté. — First and final dividend, payable July 2, Bilodeau & Renaud, Montreal, joint curator.
Re E. & Z. Durocher, Iberville. — First and final dividend, payable July 9, A. F. Gervais, St. John's, curator.
Re G. R. Fabre, Montreal. — First dividend, payable July 17, Kent & Turcotte, Montreal, joint curator.
Re C. N. Falardeau, trader, l'Ancienne Lorette. — First dividend, payable July 7, H. A. Bedard, Quebec, curator.
Re P. Houle, Ste. Perpétue. — First dividend, payable July 17, Kent & Turcotte, Montreal, joint curator.
Re A. Laurent, Sherbrooke. — First dividend, July 17, Kent & Turcotte, Montreal, joint curator.
Re J. H. Rafter, Montreal. — First dividend, payable July 17, Kent & Turcotte, Montreal, joint curator.

Separation as to property.

Léda Létourneau vs. Elzéar Laverdière, farmer and trader, parish of St. Pierre, June 10.

¹ *Carpenter v. Providence Washington Ins. Co.*, 16 Peters, 495; *Park v. General Interest Ins. Co.*, 5 Pick. 33.

² *Wilson v. Hill*, 3 Metcalfe, 66.

³ *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76, S.C. 19 id. 81.

⁴ 9 Allen, 126.

The Legal News.

Vol. XIII. JULY 5, 1890. No. 27.

A Bill passed by the House of Lords early in the Session, has for its object to abolish Vice-Admiralty Courts, and to transfer the jurisdiction to the local Courts. In other words, the Admiralty Court will, in the colonies, be a purely colonial Court in theory, and not, as now, a Court emanating from the jurisdiction of the Admiralty of England. By section 5, the appeal from the local Admiralty Court is to be to the local Court of Appeal and thence (section 6) to the Privy Council. Thus the direct appeal which at present exists to the Queen in Council will be abolished.

In the matter of the *Central Bank*, a judgment was rendered in the High Court of Justice at Toronto, May 14, 1890, following the principle laid down by Chief Justice Johnson in *Exchange Bank v. Montreal City and District Savings Bank*, M. L. R., 2 S.C. 51, and affirmed in appeal, Sept. 27, 1887. The Central Bank obtained a loan of \$12,000 from the North American Life Insurance Company, on the security of a transfer of 135 shares in the capital stock of the bank. The loan was repaid by the bank two months afterwards, but the re-transfer of the shares was never accepted so as to divest the insurance company of their title and vest it in another holder, as required by the Bank Act. The Central Bank being now in liquidation, the liquidators made an application to enforce against the insurance company the double liability on the 135 shares. The Master in Ordinary, Mr. Hodgins, Q.C., in refusing the application, observed:—"The decision of the present Chief Justice of the Superior Court of Quebec on a clause of the Savings Bank Act (R. S. C., c. 122, s. 20), which has some analogy to the clause which I have cited from this insurance company's charter, is so much within the policy of the canon of corporation law I have referred to, that I have no hesitation in applying it to the case

before me. Under a power conferred upon savings banks to loan their moneys on personal security, taking as collateral thereto 'stock of some chartered bank in Canada,' a savings bank acquired 307 shares in the the capital stock of the Exchange Bank as collateral security for loans made to several outside parties. On the winding up of the Exchange Bank, the liquidators sought to make the savings bank liable in respect of the 307 shares standing in its name in the books of the bank; but the Court held that the savings bank could not acquire or hold such shares except as pledgees, and could not become the owner of such shares within the meaning of the Bank Act, and was not therefore subject to the double liability imposed by that Act. The case of *Railway etc. Advertising Co. v. Molsons Bank*, 2 Leg. News, 207, is to the same effect." The canon referred to above is that stated in *Pickering v. Stephenson*, L.R., 14 Eq. 322, that the governing body of a corporation organized as a trading partnership cannot in general use the funds of its community for any purpose other than those for which they were contributed, or authorized to be used.

COURT OF QUEEN'S BENCH— MONTREAL.*

Constitutional law—City of Montreal—Butchers' private stalls—Taxation—37 Vict. (Q.) ch. 51, sect. 123, sub-sections 27, 31—By-law.

Held, 1. That sub-sections 27 and 31 of sect. 123 of 37 Vict. (Q.), ch. 51, by which the Council of the City of Montreal is authorized to regulate, license or restrain the sale, in any private stall or shop in the city outside of the public meat markets, of fresh meats, vegetables, fish, or other articles usually sold on markets, is within the powers of the provincial legislature.

2. That the by-law passed by the City Council under the authority of the above-named sub-sections, fixing the license to sell in a private stall at \$200, is valid.—*Pigeon & Cour du Recorder*, Dorion, Ch. J., Cross, Baby, Church, Bossé, J.J., June 26, 1889.

* To appear in Montreal Law Reports, 6 Q.B.

Expropriation—Railway—Arbitration — Arbitrator rendering additional services to party.

Held, The fact that a person who has acted as arbitrator in behalf of the landowner, has been paid by the company the amount taxed as fees for his services as arbitrator, does not preclude him from recovering from the party appointing him the value of additional services rendered to such party in connection with the same arbitration, but outside of the ordinary duties of an arbitrator, such as interviews, consultations, etc.—*Evans & Darling*, Tessier, Cross, Church, Bossé, J.J., Nov. 20, 1889.

Trustees—South Eastern Railway Company—43-44 Vict. (Q.), ch. 49—Supplies furnished to company before trustees took possession.

By the Act 43-44 Vict. (Q.), ch. 49, the South Eastern Railway Company were authorized to issue mortgage bonds to a certain amount, and to convey the railway franchise rights and interest to trustees, representing the bondholders. The trustees were empowered to take possession of the road in the event of default by the company to pay the bonds or interest thereon for 90 days. It was also provided (by sect. 10) that neither the company nor the trustees should have power to cease running any portion of the road. The respondent furnished supplies necessary for operating the road, after the execution of a trust deed in conformity with the statute above mentioned, but before the trustees took possession of the road for default by the company to pay interest on the bonds. The respondent first sued the company for the amount of his claim, and obtained judgment, and then brought the present action for the same causes against the trustees.

Held, (Reversing the judgment of Jetté, J., M. L. R., 3 S. C. 238), That the effect of the Act above mentioned, and of the deed executed in conformity thereto, was not to convey the possession of the road to the trustees from the date of such deed, so as to constitute them pledgees; and the trustees were not liable even for supplies necessary for operating the road, furnished before the time they assumed possession.

2. That although the supplies for which

payment was claimed in this case, were furnished at a time when the railway company was in default to pay interest on bonds, and when the trustees might have taken possession under the terms of the Act, but neglected to do so, the company was not thereby constituted *negotiorum gestor* of the trustees, so as to render the latter liable for supplies necessary for the operation of the road, obtained by the company before the trustees took possession.—*Farwell & Walbridge*, Tessier, Cross, Church, Bossé, Doherty, J.J., (Tessier, J., diss.), May 28, 1889.

CIRCUIT COURT.

MONTREAL, May 12, 1890.

Before BELANGER, J.

JOHNSTON v. COFFIN.

Lessor and Lessee—Delay for summons—One nonjuridical day sufficient.

A writ of ejectment was served on Saturday, returnable on Monday.

The defendant, by an exception to the form, pleaded that the delay was insufficient, that one juridical day should intervene between the day of service and day of return, and referred to *Darby v. Bombardier*, 2 Leg. News, p. 202, and *Metayer dit St. Onge v. Larichelière*, 21 L. C. J. p. 27.

The plaintiff cited arts. 75, 89 and 24 C. C. P., and *Boulerisse v. Hebert*, 2 Leg. News, p. 196, and *Preston v. Paxton*, 23 L. C. J. p. 210, *Gates v. Stewart*, 23 L. C. J. 62; *Crebassé v. Ethier*, 2 R. L. 332.

BELANGER, J., said that he could not decide otherwise in this case than he had already decided in *Boulerisse v. Hebert*, 2 Leg. News, 196, cited by the plaintiff, and since the rendering of the judgment, the Courts had adopted that ruling. The Code of Procedure did not require that the intermediate day be juridical. The case cited as to the sufficiency of the delay should be followed.

Exception à la forme dismissed.

W. S. Walker, for plaintiff.

Busteed & Lane, for defendant.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

(Registered in accordance with the Copyright Act.)

CHAPTER III.

OF INSURABLE INTEREST, THE SUBJECT INSURED,
AND WHO MAY BECOME INSURED.

(Continued from p. 208.)

A French clause is to this effect: This insurance is meant to guarantee the insured his mortgage claim in the case of a fire damaging the said house, and of the property mortgaged not offering longer a sufficient guaranty.

The money received is the mortgagor's money; the mortgagor pays the premium. If the debt has been paid before the loss, or there is overplus, the mortgagee is trustee for the mortgagor; but the insurer cannot go free. As to the relations between the mortgagee and the mortgagor, the insurer has no concern.

§ 78. Insurance, loss payable to mortgagee.

Where the mortgagor insures a house, loss if any payable to mortgagee, the mortgagor's interest is insured with power of attorney irrevocable to mortgagee to receive the avails of the policy, if fire happen. In such case, if fire happen the insurers must pay, whether the mortgagor have previously paid the mortgagee or not. If the debt have been paid, then the amount of loss received by the mortgagee is received from a fund placed in his hand for a special purpose now accomplished. The mortgagee receives it to the use of the mortgagor and must account for it.¹

Where the mortgagee insures solely on his own account, it is but an insurance of his debt.² If his debt be paid the policy can have no operation;³ nor can the mortgagor in such case claim, for he has no interest in the policy.⁴ How can any Court hold that

a policy taken by A in his sole name shall avail to B, a stranger to the policy? observes Story, J., in the case of *Carpenter v. Prov. W. Ins. Co.*¹

§ 79. Value of land mortgaged must be equal to claim insured.

The mortgaged land (claim against or upon which is insured) must offer at the time of the insurance a value equal to the claim insured and all other, earlier, claims against it. Otherwise the insurance is improper, the creditor not having any real valuable *gage*.²

The contract with the insurance company is a contract of indemnity, legal only as an indemnity commensurate with the interest of the insured.³

§ 80. Sale under execution.

In the United States a sale, by a Master in Chancery, of the property mortgaged, under a decree of foreclosure will terminate the interest of the mortgagor, although the decree may not have been enrolled, and no deed executed by the Master.⁴

§ 81. Liability of carrier until delivery of goods to consignee.

A carrier is liable for loss by fire, though the carriage be ended; if the goods have not been delivered to the consignee, and he has

¹ 16 Peters.² Boudousquie.

The Code of Holland prohibits insurance of a hypothecary claim, unless the creditor could be usefully collocated if there had been no loss by fire.

³ Per Vice. Chan. in *Ex parte Andrews*, in re Emmett, 2 Rose K.

A creditor insured his debtor's house for the full value of it. It was burnt. The insurance more than sufficed to pay the creditor. The debtor, a stranger to the contract, asked for the difference, and he got it, the insured hypothecary creditor being held *negotiorum gestor* of the debtor for the excess. There was no mention in the policy of the amount of the mortgage debt, and the insured was held to have acted in his own interest and the debtor's. Boudousquie, No. 97.

⁴ *McLaren v. Hartford Ins. Co.*, 1 Selden, 151.

Query, as to sheriff's sale alone in Lower Canada. Suppose the purchaser not to pay, may not the mortgagor, after that, have an insurable interest, or is his property defeated? Where the tenant has promised to insure, can the landlord *do it at once* and charge the tenant, or must his recourse be in damages? *Dufresne v. Lamontagne*, Superior Court, Montreal, June, 1874.

¹ See observations of Shaw, C.J., in *Kino v. The State M. F. Ins. Co.*, 7 Cush.

² *Carpenter v. The Prov. W. Ins. Co.*, Supreme Court, United States, Story, J. 16 Peters.

³ This is conceded by Shaw, C. J.

⁴ Boudousquie *contra*.

not had a chance to get them away after arrival.¹

When one is so connected with property that he is liable to indemnify the owner in case of its destruction, or of damage to it, he has an insurable interest therein.

Such is the interest of a carrier, wharfinger, or other bailee, of an agent, or other person who has taken property at his own risk, or agreed to get it insured for the benefit of the owner, and who will be liable for any loss if he fail to do so. Under this class of interests comes that of a tenant in Lower Canada, also that of an insurer, which supports a contract of re-insurance for his benefit.

§ 82. Insurance by tenant.

In Lower Canada, as in France, a tenant must pay his landlord's damage where the house occupied by the tenant is burned by negligence, and where a house is burnt the tenant is presumed negligent. Such a tenant can insure himself against the loss to which he is exposed by a landlord's suit against him in such a case.

A tenant in England cannot, in the absence of special agreement, be called upon to rebuild the house burned down accidentally during his occupation.²

If the lessee covenants to repair, and the house is burned down by act of God, negligence or accident, he must restore (Comyn).

Is the landlord, in the absence of express contract, bound to rebuild; suppose he receives the insurance money, and that the tenant is willing to hold on? In England it is said, no; but that the landlord shall not ask rent (Comyn).

In France it is not so; total destruction ends the lease, but if the loss be partial the lease is not broken, and the landlord must repair (Trop long—Louage). But if the loss be through the fault of the tenant, he must pay.

§ 83. Tenant may insure risk of having to rebuild.

The *risque locatif*, i.e., the risk on the tenant to rebuild or pay damages in case of fire, is

insurable. And a proprietor may insure the risk he has of trouble from his neighbours, if from negligence his house burns and the fire spreads to the neighbour's houses.

The tenant who has insured the *risque locatif* cannot go against the insurer, if the proprietor be quite satisfied and do not trouble the tenant, e.g. if he be satisfied from other personal insurances.¹

In case of *risque locatif* insured and fire happening, can the proprietor intervene and claim from the insurance company as if he, the proprietor, had a subrogation into the place of his tenant? Not in France.

If insured be bankrupt, all his creditors take of the proceeds of insurance of *risque locatif*. The proprietor suffers, so, in France.

In the case of *Pennsylvania R. Co. v. Kerr*, sparks from a locomotive set on fire a warehouse near the track, and from the warehouse the fire went on to a hotel 39 feet off, which was destroyed. Suit was brought against the railroad company for damages suffered by loss of the hotel, and they were recovered in the original Court. But the Supreme Court reversed the judgment on the ground that the fire came from the warehouse, and not from the locomotive directly. Secondary cause operating from an intervening cause is too remote.² It may be questioned whether the above case is not in conflict with *Smith v. London & Southwestern R. Co.*³ In this case heaps of hedge trimmings were left by servants of the railroad company near the track, and were set on fire by sparks from the locomotive. The wind spread the fire to a cottage 200 yards off, and the plaintiff recovered the value of goods burnt in the cottage.

§ 84. When lessee is liable in Louisiana.

According to Article 2693 of the Civil Code of Louisiana, the lessee can only be liable for destruction by fire when it is proved that the

¹ Paris, 10 March, 1871.

² Yet in collision cases, one ship A, coming upon another B, and making it go out of its way but hit another C, damaging it, C must sue A, and will fail against B. Law Rep. A.D. 1877. In Lower Canada, however, direct action would probably lie by C against B, B going *en garantie* against A.

³ Law Rep. 5 C. P. (Jan., 1870).

¹ *Moses v. Boston & Maine R. Co.*, A. D. 1856.

² Comyn (Landlord and tenant) [201].

same has happened either by his own fault or neglect or by that of his family. [11 Toullier, p. 206, is cited.]

§ 85. *Burden of proof as to person in fault.*

Suppose A's house to burn, is the burden on B his neighbour to prove his fault, where-by he, B, has suffered, or are fault and negligence to be presumed? Some say that A is blameable and has burden to free himself for fires occur most frequently from fault. But the majority hold that neighbours prosecuting indemnity have burden of proof, because the actor has to prove—he who alleges has to prove.¹

Ad legem Aquiliam, lib. ix, tit. 2. Voët, sec. 20. Fire happening in a house, is the occupant, or tenant, bound to prove his own diligence and freedom from fault? Or, has the proprietor, or have the neighbours injured, the burden of proving fault of occupant of the house first burnt?

Zachincus and Vinnius put the onus on the occupant; as fire is most often caused by some fault of the occupant, so he must prove himself not in fault. More regular is it, says Voët, to put the burden of proof of fault upon the landlord or the neighbour suing the occupant; for "actori incumbet probatio;" and "affirmanti probatio imponenda." 3rdly (Voët says), because in doubt everybody is to be supposed diligent until the contrary be proved. Peresius, Mascardus and others support this, says Voët.

§ 86. *Presumption in favor of lessor.*

Article 1629, Civil Code of Lower Canada, says: When premises leased are hurt by fire, there is a legal presumption in favor of the lessor that it was caused by the fault of the lessee, and unless he prove the contrary, he is answerable to the lessor.

Art. 1630 says the presumption of 1629 against the lessee is only in favor of the lessor, and not in favor of a neighbouring proprietor who suffers loss by fire which has originated in the premises occupied by the lessee.

Semile, the usufructuary has not presumption of fault ordered against him, and fire in

his case is presumed an unforeseen event—*cas fortuit*—and he who alleges fault must prove it.

§ 87. *Covenant to repair.*

Where there is a covenant to repair, and further covenant that the tenant shall insure for a sum stated, and the house is burned, the lessee is to repair, he cannot pretend limitation of liability—(to the amount of the insurance sum stated); there were and are two covenants.¹

A tenant who is obliged to leave the premises in repair must rebuild if a fire occur.²

§ 88. *Obligation to rebuild for tenant.*

If the landlord's house be burned without fault of the tenant, but it be insured, and the landlord get the money, if he have a tenant in it for a term of years, can this tenant hold on for a term of years and insist on the landlord spending the insurance proceeds in rebuilding?³ Troplong, Louage, No. 219, would seem to say so.⁴

§ 89. *Lease terminated by total destruction of building.*

Art. 1660 of the Code of Lower Canada says, if the house be totally destroyed the lease is ended. If partially destroyed the tenant may hold on at a diminished rent, or he may claim resiliation of the lease, but can claim no damages.

§ 90. *Exemption of tenant in England.*

In England, in case of accidental fire and the destruction of the leased house, the tenant at common law would have been guilty of waste if he neglected to rebuild. But by 6 Anne, c. 31, made perpetual by 10 Anne, it is enacted that no suit shall lie against any person in whose house accidental fire shall begin, or recompense made by such person for any damage suffered, except in

¹ *Digby v. Atkinson et al.*, 4 Camp.

² *Pym v. Blackburn*, 3 Cases in Chanc. Vesey, Jr.

³ Dalloz of 1833, 2nd part, p. 193.

⁴ But the above has received some *echecs*, says Troplong, referring to *Sirey*, A.D. 1828, 2nd part, p. 18. Arrêt of 5 May, 1828. Troplong says he would always allow the tenant to claim the repairs in case of partial loss, so as to secure him perfect *jouissance*.

¹ Voët ad. P. lib. 9, Tit. 2.

case of contract between lessor and lessee to the contrary.¹

If the lessee covenant to repair, and the house is burned by accident or otherwise, he is bound to rebuild.² So it is common to stipulate in leases against accidents by fire.

§ 91. *Proprietor may insure against loss of rent by fire.*

Loss of rent through a house being burnt is not a loss by fire within the meaning of ordinary policies. By condition on many policies such loss is declared not to be insured against. But it may be made, by agreement, the subject of insurance. Any person having interest in rent may insure the rent from loss by fire, and he gets paid in case of loss, rent from the time of the fire up to the time fixed by the policy.³

A rector of a parish in Lower Canada insured himself against loss of his salary if his church were burned down. (He depended chiefly upon the pew rents.) The church was totally destroyed by fire, and the rector got paid by the insurers until it was rebuilt.

A railway company has an insurable interest in buildings liable to be burned by sparks from its locomotives, and for which injury the company would be obliged to indemnify.

Rent may be insured by the proprietor: e.g., on the rental only of a house belonging to assured occupied by A, \$400. This insurance is payable only in the event of the house being damaged or destroyed by fire so as to be untenable, and the insurance covers the rental of said house from the time of the fire during the period necessary for its reinstatement, or of perfect repair, not exceeding one year's rent.

§ 92. *Proprietor may insure against liability to indemnify neighbour.*

In France and Lower Canada, a proprietor who, in case of a fire in his house, may be held liable to indemnify his neighbours for the losses of their houses burned by the fire communicating to them, can insure not only

his own house but also himself against losses to which he is exposed by the operation of actions *en garantie* of his neighbours.

A tailor insuring the merchandize and furniture of his shop can't, on fire happening, claim as for damages through suspension of his commerce during the reinstatement. The arbitrator had ordered indemnity for such alleged damages. The company insurer appealed, and succeeded in striking off these damages, 340 francs.¹

§ 93. *Proprietor of house adjoining that wherein fire commences.*

Where the burning of a house is caused by negligence, and fire from the burning destroys an adjoining house, the owner of the latter has not an action on account of the negligence which originated the fire.²

But it is not thus in Lower Canada, Comyn's Dig. "Action on the case for negligence," A. 6, "Man who by negligence burns his own house and mine also must pay me."

In Lower Canada if you stow hay in your hayloft, and it cause fire, you must pay me, your neighbour, for my property burned by reason of your fire. In Lower Canada the tenant of the hayloft would be liable in such a case towards his landlord, and then to all others.

In the case of *Whyte v. The Home Insurance Co.*,³ a miller insured a house upon land which was another's, yet he recovered.⁴

§ 94. *Insurable interest of vendee, goods stopped in transitu.*

A vendee insures goods bought by him. If he become bankrupt and the goods be stopped *in transitu*, can anybody recover? See *Clay v. Harrison*.⁵ In this case it was held that, *under the circumstances*, the vendee after the stoppage *in transitu*, which followed an abandonment, had no property in the goods insured. But, generally, after stoppage *in transitu* has the vendee an insurable in-

¹ Cour Royale, Paris, 26 April, 1833.

² *Ryan v. N. Y. Central R.R. Co.*, 35 N. Y. Rep. Compare *Pennsylvania R. Co. v. Kerr*, Flanders, p. 546.

³ 14 L. C. Jurist, 301.

⁴ 18 Pick. 419. See also *Tyler v. Aetna Ins. Co.*, 12 Wend. 507; Flanders, p. 306.

⁵ 10 B. & C.

¹ Comyn [201].

² Comyn [202].

³ 3 Kent.

terest? I cannot doubt it. Stoppage *in transitu* assumes the continuance of the contract of sale; the vendor may sue for the original price, notwithstanding the stoppage *in transitu*, if he be ready to deliver the goods on payment of their price. Moreover, the vendor has no right to resell till the period of credit has expired; till then the goods, though stopped, are at the risk of the vendee. Even after the period of credit has expired the goods are the vendee's, who is not divested of them until put *en demeure* (until he has had the goods offered to him but has refused to take them and pay). Up to the last minute, so long as the vendee has not been divested of his property in the goods, he may pay, get the goods, make a profit. I see clearly that he has an insurable interest. I would add that stoppage *in transitu* may be made though the goods have been paid for in part. Nobody can doubt that in this case the vendee has insurable interest.

In the United States the vendee of property under an executory contract of sale has an insurable interest, though he has paid no part of the consideration, nor even obtained actual or constructive possession of it. The test of his interest, if he has expended nothing upon the property, is his liability to the vendor. If the destruction or injury of the property will not cancel or diminish this liability, his interest is insurable. Neither will his interest be affected by his failure to do some act, upon the performance of which the obligation of the vendor depends, because, notwithstanding this breach of the contract by the vendee, the vendor may not choose to take advantage of it, and may still compel the vendee to receive the property, and comply with the remaining terms of the purchase.¹

§ 95. *Insurable interest of unpaid vendor.*

The vendor also, as long as he retains the

legal title, has an insurable interest to the amount of the sum remaining due upon the contract, for though he has the right to compel the purchaser to pay for the property, notwithstanding its destruction by fire before the execution of the contract, still he may be unable to do so by reason of the insolvency of the vendee, or from some other cause, in which case the property is his only security, and any injury to it will be a loss to him.¹

The interest of a vendor, mortgagor, etc., is so entirely distinct from that of the vendee or mortgagee, that the simultaneous existence of two policies on the same property, one affected by the former, and the other by the latter, will not amount to a double insurance.²

§ 96. *Person who has promise of sale.*

The vendee of property under an executory contract of sale has an insurable interest to its full value, provided the destruction or injury of the property would not affect his liability to the vendor. If he has paid the purchase money, or expended anything upon the subject insured, he has a direct insurable interest in the nature of an equitable ownership, without regard to his liability to the vendor, and if he has not, he may still be obliged to pay the price and receive the property, notwithstanding any diminution of its value, and he is consequently materially interested in its preservation.³

In Lower Canada, a man, having obtained a promise of sale to him of a house and paid for it, may insure the house to the extent of his interest. But he ought to describe his interest?

§ 97. *Bailee who is liable for loss.*

In England and the United States, a bailee of property, who is liable to the owner in case of its loss, has an insurable interest therein to the full extent of its value;⁴ and the value of the insurable interest of an in-

¹ *Sparks v. Marshall*, 2 Bing. N. C. 761; *Kenny v. Clarkson*, 1 Johns. 385; *Rider v. Ocean Ins. Co.*, 20 Pick. 259; *McGivney v. Fire Ins. Co.*, 1 Wend. 85; *Aetna Fire Ins. Co. v. Tyler*, 12 Wend. 507; S. C. 16 id. 385; *Columbia Ins. Co. v. Lawrence*, 2 Peters 25. But the contract must be a valid one, and made according to law, or an insurance will not be sustained. *Stockdale v. Dunlop*, 6 Mees. & W. 224; *Warder v. Horton*, 4 Binney 529.

¹ *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385.

² *Aetna Fire Ins. Co. v. Tyler*, 12 Wend. 507; S. C., 16 id. 385.

³ *Aetna Fire Ins. Co. v. Tyler*, 12 Wend. 507; S. C. 16 id. 385; *Columbia Ins. Co. v. Lawrence*, 2 Peters 25.

⁴ *Crowley v. Cohen*, 3 B. & Ad. 478.

surer of property is the amount he has at risk upon it.¹

§ 97. *Consignee with power to sell.*

In New York a consignee or commission merchant, in possession of goods with a power to sell the same, may insure them against fire in his own name to their full value.²

The Court in this case lay stress upon the fact that the insured was something more than a *naked consignee*, and because he is intrusted with a power to sell, they put his interest upon the same ground as that of a trustee, and whatever amount he may recover from the insurers he will hold in trust for his consignors. This case has been recognized as authority in Kentucky in the case of *Jackson v. Aetna Ins. Co.*, reported in Am. Law Reg. Apr. No. 1854, p. 374.

§ 98. *Person who has contracted to purchase.*

A person having contracted for the purchase of buildings, and made part payment, on a contract to receive a deed when the whole payment is made, has an insurable interest in the premises to their entire value.³

§ 99. *Liability of reinsurer.*

The amount of the reinsurer's liability to the reassured is the sum which the latter is legally liable to pay the original insured, and is not subject to be reduced by the insolvency of the reassured, and his consequent inability to pay to the original insured the full amount, for which he is liable.⁴

A insures his goods at the Phoenix for £1500. The Phoenix reassures at the Colonial for £500. Fire happens. A's loss is total.

¹ *Olive v. Green*, 3 Mass. 133; *Bartlett v. Walter*, 13 id. 267; *N. Y. Bowery Fire Ins. Co. v. N. Y. Ins. Co.*, 17 Wend.

² *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 84. For later law on subject of consignee's insurable interest, see *Ebenezer v. Alliance M. Ins. Co.*, L. R. 7 C. P. (July 1873). *Forest v. Fulton Ins. Co.*, founded a good deal upon *Lucena v. Crawford*, was approved, Duer notwithstanding.

³ *McGirney v. Phœn. Ins. Co.*, 1 Wend. 35 (A.D. 1829).

⁴ 1 Marshall on Ins. 143; *Hone v. Mut. Safety Ins. Co.*, 1 Sanford Rep. Sup. Ct. of City of N. Y. 137; *Herckenrath v. Am. Mut. Ins. Co.*, 3 Barbour's Chan. R. (N. Y.) 63.

The Phoenix becomes bankrupt, and is in liquidation; only paying one shilling in the £.

A can't go to the Colonial, but the assignee of the Phoenix bankrupt estate does, and gets £500. Yet A can only get from the estate of the Phoenix £75.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, June 28.

Judicial Abandonment.

Charles Leboutillier, doing business under name of John Leboutillier & Co., Gaspé Basin, June 13.

Curators appointed.

Re Allan J. Lawson, Montreal.—A. W. Stevenson, Montreal, curator, June 23.

Re Pronovost & Roy, traders, St. Félixien.—J. B. A. Letellier, curator, June 9.

Dividends.

Re Blake Bros.—Final dividend, payable July 14, J. Patrick, Carmel Hill, curator.

Re Alexander Mahen, St. Chrysostôme.—First and final dividend, payable July 28, Kent & Turcotte, Montreal, joint-curator.

Re Nazaire Prevost, Sorel.—First and final dividend, payable July 28, Kent & Turcotte, Montreal, joint-curator.

Re L. O. Roy, trader, St. François Montmagny.—First and final dividend, payable July 14, H. A. Bedard, Quebec, curator.

Separation as to property.

Rosalie Bouffard vs. François-Xavier Lamothe, village of Upton, June 11.

LORD ELDON'S MARRIAGE.—John Scott, afterwards Lord Eldon, ran away with his wife at a very early age. "The window from which Bessie Surtees descended into her lover's arms is still pointed out to every visitor to Newcastle as he pauses before the old house—the home of the wealthy banker, her father, in Sandhill, not five hundred yards from the great suspension bridge which spans the Tyne." In his old age, Lord Eldon used to tell how piteous was their condition. "On the third morning after the union our funds were exhausted; we had not a home to go to, and we knew not whether our friends would ever speak to us again." One of his earliest legal experiences was in reading, as substitute, the Vinerian law lecture. "I began," he says, "without knowing a single word that was in it. It was upon the statute of 'young men running away with maidens.' Fancy me reading with about one hundred and forty boys and young men, all giggling at the professor. Such a tit-tating audience no one ever had." The scanty means of the young people had one unpleasant effect. They developed in the pretty young bride habits of thrift which hardened into extreme parsimony. She was also very averse to society: for the run-away marriage made her delicately sensitive about society in the beginning, and at last it became distasteful to her. Curiously enough their eldest daughter married without the consent of her parents.

The Legal News.

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SUPREME COURT OF CANADA.

OTTAWA, June 13, 1890.

Quebec.]

NORTH SHORE RAILWAY Co. v. McWILLIE et al.

Railway — Damages caused by sparks from locomotive—Responsibility of company—R.S.C. ch. 109, sec. 27—51 Vic., ch. 29, sec. 287—Limitation of actions for damages.

A railway company by running a heavy train on an up grade when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, which set fire to a barn situated in close proximity to the railway track.

Held, affirming the judgment of the Court of Queen's Bench, Province of Quebec, M.L.R., 5 Q.B. 122, that there was sufficient evidence of negligence to make the railway company liable for the damage caused by the fire.

Per Gwynne, J. That the "damage" referred to in sec. 27 of ch. 109, R.S.C., and sec. 287 of 51 Vic., ch. 29, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present.

Appeal dismissed with costs.

Brosseau for appellant.

Robinson, Q.C., and Geoffrion, Q.C., for respondent.

OTTAWA, June 13, 1890.

Quebec.]

JONES v. FISHER.

Damage to land by construction of dam—Servitude—Arts. 503, 549, C.C., C.S.L.C. ch. 51—Improvement of water courses.

Where a proprietor has, for the purpose of improving the value of a water power, built a dam over a water course running through

his property, and has not constructed any mill or manufactory in connection with the dam, he cannot, in an action of damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify under the provisions of ch. 51, C.S.L.C.

Where the proprietor of a water course raises the level of the water by the construction of a dam, so as to overflow the land of other riparian owners, he cannot acquire by possession or prescription a right or title to the maintenance of the dam in question, Arts. 503, 549, C.C.

Appeal dismissed with costs.

Laflamme, Q.C., for appellant.

Geoffrion, Q.C., and Duffy, for respondent.

OTTAWA, June 12, 1890.

Quebec.]

VENNER v. SUN LIFE INSURANCE Co.

Life Insurance — Unconditional policy—Misrepresentations — Effect of—Indication of payment—Return of premium—Additional parties to a suit—R.S.C. ch. 124, secs. 27 and 28—Arts. 2487, 2488, 2585, C.C.

An unconditional policy of life insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that "if any misrepresentation was made by the applicant, or untrue answers given by him to the medical examiner of the company, then in such a case the premiums paid would become forfeited and the policy be null and void." Upon the death of the assured, the person to whom the policy was made payable sued the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that assured's was a life not insurable.

Held, 1st, that the policy was thereby made void *ab initio*, and the insurer could invoke such nullity against the person in whose favour the policy was made payable, and was not obliged to return any part of the premium paid.

2nd. That the statements misrepresented being referred to in express terms in the body of the policy, the provisions of secs. 27 and 28 R.S.C., ch. 124, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the parliament of Canada, upon which point it was not necessary to decide.

3rd. That the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation (Art. 1174, C.C.); and the provisions contained in Art. 1180, C.C., are not applicable in such a case.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to the contestation between the parties in the cause.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Amyot, Q.C.*, for appellant.

Langelier, Q.C., for respondent.

OTTAWA, June 12, 1890.

Ontario.]

SHOOLBRED V. CLARK.

Winding-up Act—R.S.C., ch. 129—Application of to provincial company—Winding-up proceedings—Reference to master.

The Union Fire Insurance Company was incorporated by the Ontario Legislature, and having become insolvent, an assignee was appointed to settle its affairs under the Insolvent Act of 1875. When the Winding-up Act was passed a petition was presented to the Court to have the company wound up under its provisions, and a winding-up order was made, which was set aside by the Supreme Court of Canada (14 Can. S.C.R. 624). A second winding-up order having been made and confirmed by the Court of Appeal, a second appeal was had to the Supreme Court by S., a shareholder.

Held, affirming the judgment of the Court of Appeal (16 Ont. App. R. 161), and that of the Chancellor (14 O. R. 618), that notwithstanding the company was incorporated by

the provincial legislature it could be put into compulsory liquidation and wound up under the Dominion Winding-up Act, R.S.C. c. 129.

Held, also, that the powers assigned to provincial courts or judges by the Winding-up Act are to be exercised by means of the ordinary machinery of the courts and their ordinary procedure. It was therefore no ground of objection to the winding-up order in this case that it was referred to a master to settle the security to be given by the liquidator appointed therein.

Appeal dismissed with costs.

S. H. Blake, Q.C., and *McLean*, for the appellant.

Bain, Q.C., for the respondents.

OTTAWA, June 12, 1890.

Ontario.]

CLARKSON V. RYAN.

Lien—Costs of execution creditor—Assignment for general benefit of creditors—Construction of Statutes 48 Vict., c. 26, s. 9—49 Vict., c. 25, s. 2.

48 Vict. (O.), c. 26, s. 9, as amended by 49 Vict. (O.), c. 25, s. 2, provides that an assignment for the general benefit of creditors has precedence over all executions not completely executed by payment "subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

Held, per Ritchie, C.J., Fournier and Taschereau, JJ., affirming the judgment of the Court of Appeal (16 Ont. App. R. 311), that the lien referred to in this section attaches to the full costs of the action of the execution creditor against the insolvent debtor.

Held, per Gwynne and Patterson, JJ., dissenting, that such lien is only for the costs of issuing execution and sheriff's fees etc., incurred in executing the same.

The statute of Ontario requiring special leave to appeal to the Supreme Court in cases where the amount in controversy is under \$1,000 (s. 43 Jud. Act, 1881) is *ultra vires* of the legislature of Ontario and not binding on the Supreme Court.

The Court of Appeal cannot impose upon a suitor conditions upon which he shall be allowed to appeal to this Court.

Appeal dismissed with costs.

Foy, Q.C., for the appellant.

Aylsworth for the respondent.

OTTAWA, June 12, 1890.

British Columbia.]

TURNER V. PREVOST.

Statute of frauds—Contract relating to interest in land—Part performance.

B., a resident of British Columbia, wrote to his sister in England that he would like one of her children to come out to him, and in a second letter he said, "I want to get some relation here, for what property I have, in case of sudden death, would be eat up by outsiders and my relations would get nothing." On hearing the contents of these letters T., a son of B.'s sister, and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine, in Idaho. While there he received a letter from B. containing the following:—"I want you to come at once as I am very bad. I really do not know if I shall get over it or not, and you had better hurry up and come to me at once, for I want you, and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram, which had not reached him before he left for home:—"Come at once if you wish to see me alive, property is yours, answer immediately. (sgd) B." Under these circumstances T. claimed the farm and stock of B., and brought an action for specific performance of an alleged agreement by B., that the same should belong to him at B.'s death.

Held, affirming the judgment of the Court below, that as there was no agreement in writing for the transfer of the property to T.

and the facts shown were not sufficient to constitute a part performance of such agreement, the fourth section of the statute of frauds was not complied with, and no performance of the contract could be decreed.

Appeal dismissed with costs.

S. H. Blake, Q.C., for the appellant.

Moss, Q.C., for respondent Power.

McCarthy, Q.C., and *A. F. McIntyre* for other respondents.

OTTAWA, June 12, 1890.

Ontario.]

CANADA SOUTHERN RAILWAY CO. V. JACKSON.

Railway company—Negligence—Accident to employee—Performance of duty—Contributory negligence.

J., a switch-tender of the C. S. Ry. Co., was obliged to cross a track in the station yard to get to a switch, and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels, and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury, the jury found that there was negligence in the management of the engine in not ringing the bell, and going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care.

Held, affirming the judgment of the Court below, Gwynne and Patterson, JJ., dissenting, that there was no such negligence on J.'s part as would relieve the company from liability for the injury caused by improper conduct of their servants.

Held, per Taschereau and Patterson, JJ., that the Workmen's Compensation for Injuries Act of Ontario, 49 Vic., c. 28, applies to the C. S. Ry. Co. notwithstanding it has been brought under the operation of the Government Railways Act of the Dominion.

Appeal dismissed with costs.

Symons for the appellants.

S. H. Blake, Q.C., for the respondent.

SUPERIOR COURT—MONTREAL.*

Action en reddition de compte—Réponse au plaidoyer au lieu de débats du compte.

Jugé :—Que quoique la procédure à suivre, suivant la loi, dans une action en reddition de compte, est que sur la production du compte par le rendant compte, le demandeur, devenant oyant compte doit, s'il n'accepte pas le compte, produire des débats du compte, néanmoins lorsqu'au lieu de produire tels débats le demandeur aura répondu au plaidoyer et aura nié ses allégués et conclu à son rejet, et que de consentement les parties auront procédé à la preuve pour et contre le compte, la Cour procédera à rendre un jugement et à établir le compte entre les parties comme s'ils avaient procédé régulièrement.—*Thomas v. Cowie, Würtele, J., 24 octobre 1889.*

Contract — Unlawful consideration — Book — Good morals—Arts. 989, 990, C. C.

Held :—That the works of an author are not contrary to good morals within the meaning of Art. 990, C. C., unless they are so immoral as to be punishable under the criminal law. The mere fact that a book has been placed in the *index librorum prohibitorum* by the Congregation of the Index, will not affect the validity of a contract made by a bookseller with an agent, for procuring subscribers to such work.—*Taché v. Derome, Davidson, J., April 26, 1890.*

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER III.

OF INSURABLE INTEREST, THE SUBJECT INSURED,
AND WHO MAY BECOME INSURED.

[Continued from p. 216.]

§ 100. Location of subject insured.

It is important that the location of movables insured be stated correctly.

In 2 Hall's N. Y. Rep. is the case of the *N. Y. Gaslight Co. v. The Mechanics' F. I. Co.* of the city of New York. The plaintiffs insured for seven years \$5,000 on fixtures placed, or to be placed, in build-

ings in New York. At the date of the policy they had fixtures in the buildings to over that value, and afterwards placed others there to over \$100,000 value. A fire occurred, and fixtures were destroyed; some of them had been placed before the date of the policy, but some only after. It was held that they were all covered by the policy. This policy was plainer than Joseph's which would have been clearer had it read, contained, or "to be contained."

Insurance was effected on wearing apparel, household furniture, all contained in a certain dwelling house on lot 8, etc. The insured sustained loss of apparel while wearing it away from the dwelling house. Held, that this loss was covered by the insurance. The insured repelled demurrer by insurers in first instance, and in appeal again the demurrer to insured's petition was held bad. (Vol. 33, Am. Rep., Iowa, 1879.) Semble, if the insured were at a distance, say in a hotel at a distance, he might as well have been allowed to sue.

§ 101. Stock-in-trade.

The term "stock in trade," when used in a policy of insurance in reference to the business of a mechanic, includes not only the materials used by him, but also the tools, fixtures and implements necessary for carrying on his business.¹

*Watchorn v. Langford*² was an action against the Eagle Insurance Company. The plaintiff, a coach plater and cow-keeper, insured his "stock in trade, household furniture, linen, wearing apparel and plate," against fire for one year. A fire happened within the year, and consumed, amongst other things, a large stock of linen drapery goods, which he had purchased a short time before on speculation, and which, it was contended, were protected by the policy under the denomination "linen." But Lord Ellenborough was clearly of opinion, that the word in the policy did not include linen drapery; *noxcitur a sociis*, and therefore the linen being preceded by the words "household furniture," and succeeded by "wearing apparel," must mean household linen or apparel.

¹ *Moadinger v. Mechanics' Fire Ins. Co.*, 2 Hall, 490.

² 3 Campb.

* To appear in Montreal Law Reports, 6 S.C.

Where a grocer insures his stock-in-trade, and subsequently adds crockery to his business and deals in both, the crockery will probably be held not covered. See Bunyon, p. 78.

§ 102. *Interpretation of particular words in policies.*

A policy on a ship builder's stock contained in his yard, bounded by certain specified streets, covers timber lying on the sides of one of those streets, it being customary in ship yards to place timber in that manner.¹ It would not be so held in Lower Canada.

A policy on furniture in a dwelling house covers articles used only occasionally as furniture, which are at other times stowed in the garret for want of room below.²

Insurance by A of the furniture in his residence does not cover furniture of third persons living with A or in the house, his residence. Dalloz, of 1845.

Insurance on a house was held to include appurtenances, as a rear building used as a kitchen, separated by a small yard. *Workman v. Ins. Co.*, 2 Louis, O. S.

In the case of *Greenwood v. Home Mutual Ins. Co.*,³ an open policy was granted, to secure such sums as should be endorsed from time to time on the policy, on stock, hazardous, not hazardous and extra hazardous, in such places as the plaintiff should report to the company, and which the company should endorse. The plaintiff had stored accordingly "in the Alabama Cotton Press" 1,078 bales cotton. A fire occurred, and 1,040 bales were destroyed. The cotton was partly in the press, partly on the banquette, and partly in an adjacent lot called the ice house lot. Suit was brought for these last, alleged to have been lost. Witnesses swore that this lot was part of the Alabama press, that the press had been in the habit of storing there, and that such is the custom at all cotton presses; and that the insurers were well aware of the facts. Judgment was given for the plaintiffs on verdict in their favor.

The word corn in marine insurance includes peas and beans. It would not do so in fire insurance in Lower Canada.

Suppose an insurance on loaf sugar; would crushed sugar, though equally refined or valuable, be covered? A sale of loaf sugar would not be carried out by delivery of crushed. And in a revenue case, Story held that a duty on loaf sugar was not to be collected upon crushed loaf sugar.⁴

Plate is covered by a policy on goods, wares and merchandizes, unless excepted expressly.

In the absence of any declaration in a policy excepting from the risk "money, bullion, bonds, bills, notes or other evidence of debt," etc., the insurance being upon *property* on board a certain vessel, it was held that current bank bills were included under the term *property*, and that the insurers were bound to pay for the loss of such bills by fire on board the vessel.⁵ It is not stated in the report what amount of bank bills had been lost, but probably it was not larger than necessary in the carrying on of the coasting business, which the insurers knew the vessel was intended to be engaged in.

Money and securities for money are generally expressly excepted from insurance.

A corn dealer and seedman insured his "stock-in-trade consisting of corn, seed, hay, straw, fixtures and utensils in business." It was held that he could not recover for a loss to hops, or malting; for the words "consisting of" limited the description.⁶

A man insuring describes himself as a haberdasher, and insures his stock. If he afterwards add to his stock cigars and tobacco, and these be lost, though part of the man's stock at the fire, they are not covered.

Property owned by the insured, or held by him in trust, covers cloth of other parties left with him to be made into clothing, and extends to the whole value of such cloth.⁴

A policy upon a "bark now being built" does not apply to spars and other articles made for it and ready to be attached to it, remaining in the yard from which the bark was launched, and near which it lay.⁵

¹ 1 Summer's Rep. p. 159.

² *Whiton v. Old Colony Ins. Co.*, 2 Metcalf, 1.

³ *Joel v. Harvey*, Law Times, A.D. 1857.

⁴ *Stillwell v. Staples*, 19 N.Y. [254] note, Sedgewick on Damages.

⁵ *Mason v. Franklin Ins. Co.*, 12 Gill & Johnson, 468.

¹ *Webb v. National Fire Ins. Co.*, 2 Sandford, 497.

² *Clarke v. Fireman's Ins. Co.*, 18 La. 431.

³ *Hunt's Merchants' Mag.* vol. 31, (A.D. 1854), p. 262.

A policy on an unfinished house does not cover wood work prepared for that house, and deposited in an adjoining one.¹

Four houses were insured as brick houses; they were brick in front but separated from one another in part by wooden framings filled with brick, and all flush plastered over. Builders saying that such were brick houses, the insurers had to pay.²

A coffee house is not an inn.

§ 103. Removal of thing insured.

Property insured may be lost in a different place from that wherein insured, e.g. where removed from danger of fire and yet burnt later in the same conflagration, from the fire spreading. There are no other cases, the general rule being the *locus in quo*.

Casaregis, 1st Disc. No. 35, says that goods cannot be removed from one place, wherein they were insured, to another without the consent of the insurer; but if moved, and both places are burnt, Casaregis would hold the insurer liable.³

If a thing be insured in a place mentioned, for instance, a boat "in a dock," place (*le lieu*) is a condition, and if the boat be burnt out of dock the insurers go free. So if No. 319 on a street be insured, Nos. 315 and 316 are not.⁴

§ 104. Furniture may be replaced or changed.

Whether a specific article is covered by a policy must be inferred from the context and general scope of the policy. If a policy cover a piano or even "the piano in the house of the insured," the piano originally in the house may be removed, and another one put into its place; but if a policy fix the identity of the things insured, things put into the place of them may not be covered; for instance, if the insurance be "on the Chickering piano No. — now in the house of the insured," and another one by some other maker be introduced, substituted for it, this will not be insured; but as to furniture in a house, this, if insured as ordinarily furniture is, may be changed freely, without fraud. Speciality is the excep-

tion in the insurance of movables.¹ *Boudouque*, No. 125. *Meubles meublants*, or stock in a shop, may be changed freely, or renewed. Furniture in a house, and insured so, may be moved out into another house, and brought back, and if being brought back they be burned, the insurers must pay.

Furniture insured in a dwelling house or building may be moved about in that house or building freely, or all may be put into half or a mere part of the house or building, and if fire happen, and only burn that part of the house where the furniture is, yet the insurer must pay.² But if the furniture be insured as in a particular part of a building, and be moved out of that part into another and be burnt, the insurers are not liable. A building (for instance) is a four story one with a shop upon the street level; if goods of insured be described as in the shop in that building, they cannot be moved to the fourth story afterwards with impunity; if burned in the fourth story the insurers go free.³

If a pottery be insured, are not the furnaces fixed in it insured? In *Black v. National Ins. Co.* (A.D. 1877) it was argued that they were not. I held that they were.

§ 105. Buildings insured separately.

In Lower Canada it is customary to insure all buildings separately; thus stables are insured separately from dwelling house, etc. Dwelling houses are furnished with blinds for summer and double windows for winter. If the dwelling house be insured and burn, the insurers must pay for it, including blinds and double windows burnt with it, or in it; but if these, or any of them, be stowed away in a coach house or stable, which is burnt, uninsured, the insurers need not pay for them.

In Louisiana it has been held that the word "house" includes out-buildings belonging to the house.⁴

The judgment proceeded upon the principle that the out-buildings were accessories, and that in the contract of sale they would follow the house, and, certainly, they would, even

¹ *Ellmaker v. Franklin Fire Ins. Co.*, 5 Barr, 183.

² Vol. 28, p. 462, *Hunt's M. Mag.* of 1852.

³ Perhaps Casaregis means moved out of a burning house, and later the other house be burnt too.

⁴ *Rolland v. Citizens Ins. Co.*, M. L. R., 4 Q. B.

¹ See *Renaud case*; and after it, in 1878, in *New York, Bryce v. Lorillard F. Ins. Co.*, 14 Am. Rep.

² *Dict. du Cout. Com.*

³ *Boynon v. C. & Essex M. Ins. Co.*, 16 Barbour's R.

⁴ *Workman v. Ins. Co.*, 2 La. R., by Miller.

if detached. But the principles governing in ordinary sales must differ somewhat from those governing insurances. In Workman's case the insurers had foolishly insured two houses, adjoining one another, for a sum, so much the two without description beyond that of the numbers (5 and 7) upon a street. The policy, however, stated that for purposes of insurance every building was to be separately valued. In Lower Canada nobody would pretend, under such circumstances, that if A insure the two houses of B, Nos. 9 and 10 St. Paul street, the stables and coach houses (detached out-buildings) are covered as accessories to the houses.

§ 106. Books of account, etc.

Books of accounts, written securities or evidences of debt, title deeds, writings, money or bullion are not deemed objects of assurance, generally, but in Quebec are generally excepted unless specially insured.

§ 107. Who may become insured.

"All persons capable of contracting may insure objects in which they have an interest and which are subject to risk," says our Civil Code, Art. 2472.

Any trustee, mortgagee, reversioner, common carrier, agent, or *mandataire*, having interest in buildings, or goods, if his quality be announced or the nature of his interest stated. The exact nature need not be stated unless there be a condition requiring it. The mortgagor and mortgagee may, each, insure the same buildings. Hypothecary creditors can for themselves, even without the concurrence of their debtor, insure the house mortgaged. Even ordinary creditors may insure their debtor's property without his knowledge.¹

Some authors would allow creditors even chirographary to insure their debtors' goods and chattels, as houses. The insurer shall not recover more than he could possibly have got paid if no fire had occurred. P. 195, Hettier. Des Ass. Terr.

§ 108. Railroad companies.

Railroad companies may take policies to cover their liability for loss or damage by fire, occasioned by sparks from locomotives,

to the property of others on lands not owned nor occupied by the assured.¹

§ 109. Usufructuary.

An usufructuary can insure the house or goods of which he has the usufruct, for he will lose if it be burnt.² He is liable for loss by fire, if proved in fault. The proprietor may insure too,³ but cannot recover beyond the value of his property, deducting value of the usufruct.

§ 110. Reversioners.

Sellers having *faculté de réméré* may insure; but, *semble*, by the Code of Lower Canada they must specify their interest.

§ 111. Minors.

Minors, in France and in the Province of Quebec, can oblige others as insurers towards them; if a minor insure his house, and it be burnt, the insurer must pay. Owing to the qualified nullity of a minor's contracts, Pardessus says that if a minor insure and his premium be unpaid, it cannot be collected after the risk is ended without loss. Boudousquie and others show that the contrary is the law unless the contract has been unfair. Pardessus goes so far as to say that if a minor pay premium and no loss happen, he can recover back the premium. This certainly would not be the case in the Province of Quebec. There is no doubt that a minor trader, or non-trader, emancipated or not, in that province can insure his property and bind himself to pay the premium.

§ 112. Husband and wife.

In *Clarke et ux. v. Fireman's Ins. Co.*,⁴ the policy was taken by a husband in his name only, covering the furniture in a house described. The defendants said that the furniture was really the separate property

¹ In Massachusetts, railroad companies got legislative authority so to assure. In the Province of Quebec this was not necessary.

² Sirey, A.D. 1837. Proudhon differs, Tom 3, No. 1551. Proudhon says the tenant's liability is expressed, not that of the usufructuary.

³ The usufructuary of a house is not to meddle with the *nu propriétaire's* insurance money received after the burning of the house upon a policy taken by the *nu propriétaire*. Besançon, 28 Feby., 1856. Alauzet, *contra*, Tome 1, No. 140.

⁴ 18 La. Rep. (by Curry).

¹ No. 10, Ass. Terr. Bolland de Villargues.

of the wife; and it was shown to be hers. It was held that, nevertheless, the husband might administer it, and insure it in his own individual name; that he need not declare the extent of his interest; that as to the wife's dotal property he alone has the administration of it, though the wife is the proprietor of it; and as to her paraphernal property he has the administration of it also, unless the wife, separately, be administering it.

A husband can insure as his own the property of the community existing between his wife and himself, and of which he is chief. Wives, if *marchandés publiques*, or public traders, may insure their merchandise without their husbands' consent; and a wife separated as to property from her husband can insure her property, for such insurance passive is only an act of administration. As to married women common as to property with their husbands, it is said by French writers that their contracts, unauthorized expressly by their husbands being null, they cannot effect an insurance, as they have not the administration of the common property. In the Province of Quebec, an insurance effected by such married woman is not null. Husband and wife would be allowed to sue upon it. In modern France, Boudousquie says such a contract will be held confirmed by the husband's ratification express or implied. In Louisiana an insurer would not be allowed after a fire to urge that the wife's insurance was a nullity.

§ 113. Stockholders, insolvents, partners, etc.

A stockholder in a corporation insured his interest in its factory against loss by fire. Held, that he had an insurable interest.¹

Bankrupts or insolvents may insure.

In *Converse v. Citizens Mut. Ins. Co.*,² it was held, per Shaw, Ch. J., that one partner may have an insurable interest in a building purchased with partnership funds, though it stands upon land owned by the other partner.

¹ *Warren v. Davenport Fire Ins. Co.*, 31 Iowa. (A.D. 1872-3.)

² 10 Cushing's Rep. (A. D. 1852.)

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 5.

Judicial Abandonments.

Charles Le Boutillier, trader, Gaspé Basin, doing business under name of John Le Boutillier & Co., July 2.

Lagrenade, Beauchamp & Cie., boot and shoe manufacturers, Montreal, June 28.

Curators appointed.

Re H. Charron & fils, wood and coal merchants, Ste. Candeigne.—T. Gauthier, Montreal, curator, June 30.

Re Placide Daoust, grocer, Montreal.—T. Gauthier, Montreal, curator, June 30.

Re Appolinaire Lavallée, absentee.—C. Desmarceau, Montreal, curator, June 28.

Re Elzéar Laverdière, farmer, parish of St Pierre de la Rivière du Sud.—E. Lavergne, N. P., Montmagny, curator, June 26.

Dividends.

Re C. S. Aspinall, manufacturer, Montreal.—First and final dividend declared, A. F. Riddell, Montreal, curator.

Re Hilaire Bachand, St. Césaire.—First and final dividend, payable July 22, J. O. Dion, St. Hyacinthe, curator.

Re Oscar Beauchamp, Montreal.—First dividend, payable July 24, Kent & Turcotte, Montreal, joint curator.

Re J. B. Phénix, St. Théodore d'Acton.—First and final dividend, payable July 18, J. O. Dion, St. Hyacinthe, curator.

Re Wm. Stanley, bookseller, Quebec.—Second and final dividend, payable July 22, H. A. Bedard, Quebec, curator.

Separation as to property.

Elizabeth Blouin vs. Vital Côté, hotel-keeper, Plessisville, June 30.

Cadastrés deposited.

For township of Stukely, parish of St. Gabriel de Brandon; subdivision of lot 230, Centre Ward of Sherbrooke; subdivision Nos. 91-1, 91-2, St. Roch's Ward, Quebec.

Quebec Official Gazette, July 12.

Judicial Abandonments.

John Leblanc, trader, Carleton, July 9.

Curators appointed.

Re Chas. Chappellaine, trader, St. François du Lac.—David Seath, Montreal, curator, June 27.

Re Alphonse Lafrenais, trader, parish of St. Germain de Grantham.—J. H. Moulin, Drummondville, curator, July 2.

Re Lagrenade, Beauchamp & Co.—C. Desmarceau, Montreal, curator, July 8.

Re Frederick Lewis.—W. A. Caldwell, Montreal, curator, July 3.

Re Geo. T. Linde, Montreal.—J. McD. Hains, Montreal, curator, July 5.

Re Louis Mayer.—W. A. Caldwell, Montreal, curator, July 3.

Re Rosario Monast.—Bilodeau & Renaud, Montreal, joint curator, July 4.

Re Edmond Perusse, Port Daniel.—W. Le B. Fauvel, Pasbebiac, curator, July 2.

Re James Thomson, Montreal.—W. A. Caldwell, Montreal, curator, July 9.

Re Chas. Vaudry, painter, Montreal.—J. M. Wilson, Montreal, curator, July 5.

Separation as to property.

Delia alias Rosianna Lefebvre vs. Placide Daoust, grocer, Montreal, July 2.

The Legal News.

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SUPREME COURT OF CANADA.

OTTAWA, June 12, 1890.

Nova Scotia.]

SPINNEY V. OCEAN MUTUAL INS. CO.

Marine insurance—Delay in prosecuting voyage—Deviation—Increase of risk.

The cargo of a coasting vessel was insured for a voyage from Pubnico, N.S., to Lunenburg and, or Halifax, the policy containing the usual clause allowing the vessel, in case of extremity, to put into and stay at any port or ports without prejudice to the insurance. The vessel sailed on December 15th, 1886, and on December 21st arrived off Shelburne harbour, and put in there for shelter. The next day she started again, but returned to the harbour, remaining until December 27th, when she went out and again returned. She did not attempt to sail again until January 3rd at midnight, and was driven back by a storm, and on January 4th she got out of the harbour, and there being a heavy sea, attempted to get back, but got on shore and was wrecked. In an action to recover the insurance, evidence was given by the shipmasters, and the log of a Government vessel cruising in the vicinity, that the vessel could have proceeded on her voyage several times during the stay in Shelburne, and it was shown that other vessels had put into Shelburne during the same time and had gone to sea again. The insurance company pleaded, among other pleas, barratry and deviation. The trial judge held that the conduct of the master of the insured vessel, there being no satisfactory explanation or excuse offered for his delay, amounted to barratry, and gave judgment for the defendants on that plea. The full Court, on appeal, held that barratry was not established, as it depended on the evidence of a witness to whom the trial judge attached no credit, but they sustained the verdict on the ground of deviation. On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the Court below (21 N. S. Rep. 244), that there is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation, but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss.

Held, also, that in case of deviation by delay, as in that of departure from the usual course of navigation, it is not necessary to show that the peril has been enhanced in order to avoid the policy.

Appeal dismissed with costs.

Henry, Q.C., and *Bingay*, for the appellants.
Borden, for the respondents.

OTTAWA, June 12, 1890.

Nova Scotia.]

FITZRANDOLPH V. MUTUAL RELIEF SOCIETY OF NOVA SCOTIA.

Life insurance—Application for policy—Reference to application in policy—Construction—Warranty—Mis-statement.

An application for membership in a mutual insurance society contained a declaration by the applicant warranting the truth of the answers to the questions, and of the statements in such application, and an agreement that if any of the same were not true, full and complete, the bond of membership issued thereon should be void.

Among the questions in the application was one requiring the applicant to answer "yes" or "no" as to whether he had ever had any of certain diseases named. The list of such diseases was printed in perpendicular columns, and opposite the disease, at the head of each column, the applicant wrote "no," and underneath it, opposite the other diseases named, placed marks like inverted commas.

On the trial of an action to recover the amount insured by a bond issued in pursuance of this application, it was found as a

fact that the applicant had had one of the diseases opposite which the said marks appeared. The bond issued purported to insure the applicant "in consideration of statements made in the application herofor," etc.

Held, affirming the judgment of the Supreme Court of Nova Scotia (21 N. S. Rep. 274), that the application was incorporated with the bond and made part of the contract for insurance, and that whether the applicant intended the mark opposite the disease which it was found he had had to mean "no," or intended it as an evasion of the question, the bond was void for breach of the warranty in the application.

Appeal dismissed with costs.

Borden, for the appellant.

Henry, Q.C., for the respondent.

COURT OF QUEEN'S BENCH—
MONTREAL.*

Trustees—South Eastern Railway Company—
43-44 Vict. (Q.) ch. 49—*Cars sold to company before trustees took possession.*

By the Act 43-44 Vict. (Q.) ch. 49, the South Eastern Railway Company were authorized to issue mortgage bonds to a certain amount, and to convey the railway franchise, rights and interest to trustees representing the bondholders. The trustees were empowered to take possession of the road in the event of default by the company to pay the bonds, or interest thereon for 90 days. It was also provided (by sect. 10) that neither the company nor the trustees should have power to cease running any portion of the road. The respondents sold cars to the company, after the execution of a trust deed in conformity with the statute above mentioned, but before the trustees took possession of the road for default by the company to pay interest on the bonds. The respondents first sued the company for the amount of their claim, and obtained judgment, and then brought the present action for the same causes against the trustees.

Held.—(Reversing the judgment of Mathieu, J.), 1. That the effect of the Act above mentioned, and of the deed executed in conformity therewith, was not to convey the possession of the road to the trustees from the date of such deed so as to constitute them pledgees; and the trustees were not liable for the price of cars necessary for operating the road, furnished before the time they assumed possession.

2. That although the cars for which payment was claimed in this case were furnished at a time when the railway company was in default to pay interest on bonds, and when the trustees might have taken possession under the terms of the Act, but neglected to do so, the company was not thereby constituted *negotiorum gestor* of the trustees, so as to render the trustees liable for the value of supplies necessary for the operation of the road, obtained by the company before the trustees took possession.—*Farwell & Ontario Car & Foundry Co., Tessier, Cross, Church, Bossé, Doherty, JJ.*; (Tessier and Church, JJ., diss.), May 28, 1889.

*City of Sherbrooke—Telephone company—*31
Vict. (Q.) ch. 25—*Arts. 752, 757, M. C.*

Held.—(Affirming the judgment of Brooks, J., 12 Leg. News. 354), That letters patent issued by the lieutenant-governor in council, incorporating a telephone company, with power to carry on business in the province under the provisions of Sect. 8 of 31 Vict. ch. 25 (now R. S. Q. 4705), to wit, to construct and operate a line or lines of telephone through, under or along the sides of and across streets and highways of towns, cities, etc., in the province, provided that passage or traffic in said streets or highways shall not be impeded or interfered with by the location of the poles and wires of the company, do not confer on the telephone company the power to plant poles and carry wires along and across the streets of a city without first having obtained the permission of the city corporation in whom, by Arts. 752, 757 M. C., the ownership of the streets is vested.—*Sherbrooke Telephone Association & Corporation of City of Sherbrooke, Dorion, C.J., Tessier, Baby, Bossé, Doherty, JJ.*, June 19, 1890.

* To appear in Montreal Law Reports, 6 Q. B.

*Litigious right—Advocate—Promissory note—
Art. 1485, C.C.*

Held:—1. Where an advocate, in contravention of Art. 1485, C.C., becomes the buyer of a litigious right which falls under the jurisdiction of the Court in which he exercises his functions, his action for the recovery of such right will not be maintained.

2. Where an advocate takes a transfer of a note after maturity, knowing that payment thereof has been refused by the maker because no consideration was received, he will be deemed to be buying a litigious right.—*Bergerin & Masson*, June 19, 1890.

SUPERIOR COURT—MONTREAL.*

*Inn-keeper—Lien of, upon the goods of guests—
R. S. Q. 5820.*

Held:—That the lien of a hotel-keeper on the baggage and effects of his guest, for the price of food and accommodation, extends to goods belonging to third persons, brought into the hotel by the guest with their permission express or implied.—*Marcuse v. Hogan*, Taschereau, J., March 5, 1890.

Prothonotary—Responsibility for loss of record.

Held:—1. That the summary jurisdiction of the courts over the officers of justice is exercised only when an officer is guilty of contempt or wilful neglect of duty.

2. That where a record disappears, or is lost, without any evidence of wilful neglect against the prothonotary, the latter is not punishable for contempt, the proper remedy of the party aggrieved by such loss being an action of damages.—*Bossière et al. v. Bickerdix*, Wurtele, J., June 19, 1890.

*Légataires particuliers—Paiement des dettes—
Fidéli-commissaire—Saisine.*

Jugé:—1o. Que lorsque par testament une personne laisse tous ses biens à un fidéli-commissaire avec entr'autres obligations celle de les diviser ou de les léguer quand

* To appear in *Montreal Law Reports*, 6 S. C.

bon lui semblera à ses enfants, savoir, ceux du testateur, ou à l'un d'eux, par parts égales ou inégales, le fidéli-commissaire devant avoir en attendant la jouissance et la saisine de ces biens, les créanciers de la succession n'ont pas d'action contre les futurs héritiers, enfants du testateur, aussi longtemps que les biens n'ont pas été partagés ou légués par le fidéli-commissaire.—*Martin dit Ladouceur v. Lionais*, Davidson, J., 17 mars 1890.

*Capias—Cautionnement—Renouvellement—
Condition résolutoire—C. P. C. art. 828.*

Jugé:—1o. Que lorsqu'une obligation est contractée sous la condition qu'un événement n'arrivera pas dans un temps, cette condition est accomplie, lorsque ce temps est expiré sans que cet événement soit arrivé ;

2o. Que l'obligation consentie avec condition résolutoire, dans un temps déterminé, devient une obligation sans condition, lors que le temps fixé est expiré sans l'avènement de la condition ;

3o. Que lorsqu'un cautionnement est fourni, sous l'article 828 du C. C., et que le délai fixé pour le renouveler suivant les articles 824 et 825 du code est expiré sans que ce renouvellement soit fait, la Cour ne peut permettre que ce cautionnement soit donné ; le délai dans ce cas n'étant pas un délai de procédure, mais formant partie d'une véritable convention, avec condition résolutoire, et qui est devenue pure et simple.—*Letang v. Renaud*, Mathieu, J., 21 mai 1890.

*Sale by authority of justice—Sheriff's sale—
Arts. 710, 1275, C. C. P.—Arts. 297, 298,
945, 993, 1484, 2207, 2232, 2251, 2254,
2258, C. C.—Substitution—Fraud—Nullity
—Prescription.*

Held:—1. The will in this case created a substitution in favor of plaintiff.

2. A sale of substituted property by authority of justice is null as regards the substitute who was not represented therein, where the authorization to sell was obtained by the tutrix fraudulently concealing the will creating the substitution (not yet open),

and by also withholding information as to the assets and grossly overstating the debts of the succession.

3. A sale under judicial authorization is also null, where the property of a minor not represented by a tutor *ad hoc*, is sold to his tutrix through persons interposed who were merely *prête-noms*, and made no payments on account of the price.

4. The substitute may assert his claim to property so sold, even against a third party who has become the purchaser thereof at sheriff's sale under an execution issued against a person who held the property under title from the tutrix, such sale having taken place after the substitute became of age, but before the substitution was open.

5. The ten years' prescription in favor of a purchaser in good faith with title, runs against a substitute who is a minor, only from his majority.—*McGregor v. Canada Investment & Agency Co.*, Pagnuelo, J., May 30, 1890.

Contrat d'assurance—Agent—Assuré—Lien de droit—Défense en droit.

Jugé.—Qu'il n'y a pas de lien de droit entre un agent d'une compagnie d'assurance et une personne qui, par l'entremise de cet agent, prend une police d'assurance dans la compagnie; et qu'une action intentée par l'agent contre cet assuré qui ne paye pas ses primes, pour la part ou le profit que l'agent doit en retirer d'après ses arrangements avec la compagnie d'assurance, pourra être déboutée sur défense en droit.—*Daveluy v. Hénault*, Tait, J., 17 mai 1890.

Quo Warranto—Ordre du juge—Résidence du défendeur—Exception à la forme.

Jugé.—1o. Que dans un *Quo Warranto*, le défendeur étant désigné comme "conseiller de la municipalité de..." sans que son domicile ou sa résidence fût autrement indiqué, cette description est suffisante.

2o. Que lorsque l'ordre du juge ordonne au défendeur de comparaître devant un juge de la Cour Supérieure, et que le bref commande de comparaître devant la Cour Supé-

rieure, cette irrégularité n'est pas assez matérielle pour faire annuler le bref.—*Gaudry v. Martel*, Davidson, J., 6 juin 1890.

Capias—Commerçant—Suspension de paiement—Affidavit.

Jugé.—Que pour qu'un *capias* puisse émaner contre un commerçant qui a cessé ses paiements, il faut une suspension générale de paiements, et non pas seulement le défaut de la part du commerçant de payer une certaine dette, surtout lorsque l'affidavit énonce que le défendeur a contesté devoir cette dette.—*Herman v. Lewis*, Wurtele, J., 16 juin 1890.

Cour du Recorder—Conviction—Coupable et acquitté en même temps—Certiorari.

Jugé.—Qu'une conviction par laquelle un accusé est trouvé coupable et est en même temps acquitté, est contradictoire, illégale, et peut être cassée sur *certiorari*.—*Cardinal v. Cité de Montréal*, Taschereau, J., 12 mai 1890.

Certiorari—Juridiction—Mal jugé.

Jugé.—Qu'il n'y a lieu à l'émanation et au maintien d'un bref de *certiorari* que lorsqu'il y a excès ou défaut de juridiction, ou lorsque la procédure contient de graves informalités et qu'il y a lieu de croire que justice n'a pas été rendue, mais ce bref ne peut être maintenu lorsque l'on se plaint que du mal jugé du juge.—*Valois v. Muir, & Desmoyers*, Mathieu, J., 18 juin 1889.

Acte Electoral de Québec—Electeurs—Locataires Rôle d'évaluation—Location.

Jugé.—1o. Que pour être qualifiés comme électeurs parlementaires pour la province de Québec, d'après la loi électorale de Québec, 52 Vict., ch. 4, article 173, les locataires doivent jouir de biens immeubles, qui, par le rôle d'évaluation en force, sont évalués séparément à \$200 au moins, dans les municipalités autres que les cités;

20. Que les locataires pour être ainsi qualifiés doivent avoir loué à l'année et non au mois.—*Galipeau v. Corp. de la paroisse de la Pointe-aux-Trembles*, Wurtelle, J., 22 mai 1890.

Promissory note—Fraud and want of consideration—Holder in good faith.

Held:—That where a promissory note has been obtained by fraud, and without any consideration received by the maker thereof, such note is absolutely void, and a third party, who has become the holder in good faith, is not entitled to recover the amount thereof from the maker. Moreover, in the present case, the note being received as collateral security, the holder was not entitled to recover without proof that his claim against the endorser was still in existence.—*Banque Jacques Cartier v. Leblanc*, de Lorimier, J., March 8, 1890.

Liste électorale de Québec—Qualification d'électeurs—Employés publics—Curé—Fils de propriétaire—Résidence—Vente pour taxe—Rôle d'évaluation—Preuve.

Jugé:—10. Que des employés du Gouvernement qui travaillent pendant la saison de navigation et reçoivent \$1.25 par jour, qui sont continués dans leur emploi d'année en année sans nouvel engagement, tombent sous la § 4 de l'article 186 de l'Acte Electoral de Québec, et ne peuvent être mis sur la liste des électeurs;

20 Qu'un curé d'une paroisse qui occupe des biens-fonds donnés à la fabrique pour l'usage du culte, n'en est que l'administrateur et n'occupe ces biens qu'en sa qualité de curé, et comme tel, il ne peut être mis sur la liste des électeurs parlementaires sous l'Acte Electoral de Québec, l'occupation officielle n'étant par elle exigée par la loi;

30. Que le temps pendant lequel un fils de propriétaire doit avoir résidé avec son père, son beau-père, son grand-père, sa mère ou sa belle-mère est un an avant la date de la confection de la liste des électeurs;

40. Qu'un fils de propriétaire qui travaille constamment en dehors de la municipalité, mais dont les absences sont moindres que

six mois, qui n'a pas d'autre résidence que celle de son père et qui contribue à l'entretien de l'établissement de son père, est qualifié pour être mis sur la liste des électeurs;

50. Que la vente d'un immeuble pour taxes municipales déqualifie le propriétaire sur lequel la vente est faite, comme électeur parlementaire de Québec, à partir de la vente, quoique cette dernière reste révocable par le retrait qu'en peut faire dans les deux ans l'ancien propriétaire; l'effet de la vente, par les articles 1004 et 1013 du code municipal étant de transporter immédiatement la propriété du lot vendu à l'acheteur;

60. Qu'il ne peut être permis à un fils de propriétaire pour établir sa qualification de prouver que, depuis la confection du rôle d'évaluation, la propriété de son père, sur laquelle il veut se qualifier, a augmenté en valeur; dans ce cas le rôle d'évaluation seul fait foi de la valeur de l'immeuble.—*Brunet v. Corporation de Ste. Anne de Bellevue*, Wurtelle, J., 28 mai 1890.

Mandat—Responsabilité—Vente.

Jugé:—Que lorsqu'un marchand vend, de bonne foi, à des personnes se présentant comme mandataires d'une société incorporée, des marchandises qu'il livre à cette dernière, et que celle-ci accepte, et que de plus, par son silence et par ses actes, elle donne des motifs raisonnables de croire que ces susdites personnes étaient réellement ses mandataires, ce marchand peut poursuivre directement la corporation pour le prix des choses vendues.—*Cassidy v. Montreal Fish and Game Club*, Taschereau, J., 1 juin 1889.

Capias—Vente à vil prix—Cession—Défaut de rendre compte—Contestation du bilan.

Jugé:—10. Qu'il y a lieu à *capias* contre un débiteur qui dispose de ses meubles à vil prix, pour argent comptant, à la veille de faire cession de biens, et qui ne rend pas compte du produit;

20. Que le droit qu'ont les créanciers de contester le bilan d'un failli ne leur enlève pas celui d'avoir recours à la voie du *capias*

s'il y a recel et dissipation frauduleuse de sa part.—*Létang v. Renaud, Taschereau, J., 4 déc. 1889.*

Capias—Assignment in trust—Acquiescence.

Held :—That where a creditor, by filing his claim with the trustee, has acquiesced in a voluntary assignment in trust made by his debtor for the benefit of his creditors, such creditor is estopped from demanding that the debtor shall make a judicial abandonment; and therefore is not entitled to obtain the issue of a writ of *capias* on the pretext that his debtor has refused to make a judicial abandonment.—*Boston Woven Hose Co. v. Fenwick, Wurtels, J., June 23, 1890.*

Exécution—Jour de retour—Vente subéquente—Nullité.

Jugé :—Que la vente judiciaire des biens meubles saisis ne peut se faire après le jour fixé pour le rapport du bref; et qu'une opposition afin d'annuler basée sur ce grief est bien fondée.—*Brodeur v. Leblanc, deLorimier, J., 2 oct. 1889.*

Capias—Dommages—Règlement de la dette sans réserve.

Jugé :—Qu'un débiteur, arrêté sous *capias*, qui règle avec son créancier pour le montant réclamé par l'action, sans se réserver spécialement son recours en dommage contre son créancier pour fausse arrestation, ne peut plus subéquemment poursuivre le créancier pour dommage; le reçu accepté par le demandeur constituant un règlement final entre les parties.—*Desautels v. Filiatrault, Jetté, J., 16 nov. 1889.*

Cause sommaire—Action sur obligation.

Jugé :—Qu'une action en recouvrement du montant d'une obligation hypothécaire n'est pas une cause sommaire, sous l'article 387 du Code de Procédure Civile.—*Delorme v. Smart, Wurtels, J., 22 mai 1890.*

QUEEN'S BENCH DIVISION.

LONDON, March 27, 1890.

JONES v. PADGETT (24 Q. B. D. 650).

Contract to manufacture equal to sample—Latent defect in sample—Implied warranty of merchantableness.

The plaintiff carried on the business of a woollen merchant and that of a tailor. The defendants, woollen manufacturers, contracted with the plaintiff as a woollen merchant to manufacture and supply to him indigo blue cloth according to sample. The plaintiff intended to use the cloth in his tailor's business for the purpose of making it into servants' liveries; but neither the fact that the plaintiff was a tailor nor that he intended to use the cloth for liveries was known to the defendants. There was evidence that one of the ordinary uses to which that particular kind of cloth was applied was the making of liveries. The defendants supplied to the plaintiff cloth which corresponded with the sample; but the sample, owing to a latent defect, was unsuited for the purpose of being made into liveries, though there was no evidence that it was unsuitable for other purposes for which cloth of that description was frequently used. The plaintiff having brought an action against the defendants for breach of an implied warranty of merchantableness, the judge left to the jury the question whether the cloth was merchantable as supplied to woollen merchants, and refused to leave to them the question whether an ordinary and usual use of cloth of that description was the making of it into liveries. Held, that the judge was right in refusing to leave the latter question to the jury, and that there was no misdirection.

Appeal from the Westminster County Court. The plaintiff carried on the business of a woollen merchant at one address, and of a tailor at another. As a woollen merchant, he ordered of the defendants, who were woollen manufacturers, a quantity of "indigo blue cloth," to be made according to sample. He intended to use the cloth in his business as a tailor for the purpose of making it into servants' liveries; but the fact that he was a tailor as well as a woollen merchant was

unknown to the defendants, and he did not communicate to them the particular purpose for which he wanted the cloth. The defendants made and supplied to the plaintiff cloth which was of the description ordered, and which corresponded with the sample. The plaintiff made the cloth into liveries which he supplied to a London club for the use of its servants. After the liveries had been in use for a few weeks, they showed signs of wear, the surface of the cloth came off, and the dye came out. It was admitted that the cloth was not strong enough in texture for the hard usage to which servants' liveries are subjected, and that it was altogether unsuitable for that purpose. There was evidence that one of the ordinary uses "to which indigo blue cloth was applied was the making of servants' liveries, though it was also frequently used for other purposes, such as carriage linings, caps and boots. There was no evidence that the cloth supplied by the defendants was unsuitable for these latter purposes. Before ordering the cloth the plaintiff subjected the sample to the ordinary tests for the purpose of ascertaining whether it was suitable for liveries, and failed to discover that it was not so. The plaintiff having sued the defendants for breach of an implied warranty that the cloth was merchantable, the judge left to the jury the question whether it was merchantable as supplied to woollen merchants, and refused to leave to them the question whether an ordinary and usual use of cloth of the description ordered was the making of it into liveries. The verdict having passed for the defendants, the plaintiff moved for a new trial on the ground of misdirection.

LORD COLERIDGE, C. J. I am of opinion that in this case the direction of the County Court judge to the jury was right, and that there was not any such non-direction as made his direction amount to a misdirection. There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose, he impliedly warrants that it is fit for that particular purpose. That is a principle which was established some sixty years ago in the case of *Jones v. Bright*, 5 Bing. 533, and has been acted upon ever since. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought, and there was nothing to fix him with knowledge of that purpose. Here all that was shown was that the seller on the one side was a manufacturer, and the buyer on the other side was a woollen merchant. No doubt it was possible that the buyer might sell the goods to some person or other who might use them for a purpose for which they were not fit, and I may assume that the goods here were unfit for the particular purpose to which the plaintiff applied them.

But there was nothing, beyond the position of the parties, to show that the seller knew the specific purpose for which they were bought, and it could not be denied that they might have been used for a variety of other purposes for which they were fitted. The plaintiff might have sold them to be used for purposes for which they were applicable. But then it is said that the case of *Drummond v. Van Ingen*, 12 App. Cas. 284, in the House of Lords, carries the law farther than *Jones v. Bright*, 5 Bing. 533. In my opinion that is not so. There was no intention on the part of the Lords to extend the old rule. Lord Macnaghten expressly said that he did not go beyond it; so also did Lord Selborne. And Lord Herschell, on whose judgment special reliance has been placed, was particularly careful to explain that he did not intend to carry the doctrine farther. He said: "It was urged for the appellants by the attorney-general, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognizant of all the purposes to which the article he manufactured might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials." If the plaintiff is to succeed, it must be on the ground of the reasonableness of imputing such knowledge to the manufacturer. I do not see that there was any evidence that the making of liveries was the only purpose, or even the most usual purpose, for which this particular kind of cloth was ordinarily used, and unless that is so there is nothing to fix the manufacturer with knowledge which would bring the case within the rule.

LORD ESHER, M. R. The question which was left by the judge to the jury, and the sufficiency of which is now complained of, was whether the cloth supplied by the defendants to the plaintiff was merchantable as supplied to woollen merchants. The cloth in question was ordered under a particular name, namely, "indigo blue cloth," by a woollen merchant of a woollen cloth manufacturer, to be made according to sample. It was not denied that the cloth supplied answered the name, nor was it disputed that it agreed with the sample. But it was said that there was a breach of an implied warranty that it should be fit for the particular purpose of being made into liveries. Now the rule with regard to the implied warranty of fitness which arises in the case of a sale of goods is that which is laid down in *Jones v. Just*, L. R., 3 Q. B. 197, in the fourth of the five classes of cases there enumerated:

"Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied." Those are the limits of the warranty. Here the goods were ordered by a woollen merchant. He no doubt happened also to be a tailor; but that fact was unknown to the defendant. The purpose for which a woollen merchant buys cloth is to sell it again to others. There was indeed evidence that such cloth as this, if sold to a tailor, was not fit for one of the purposes to which a tailor might apply it. But there was no evidence that it was not fit for other of the purposes even of a tailor. Moreover, the cloth might have been sold by woollen merchants to fifty other classes of persons besides tailors. There was no evidence that wool manufacturers know that woollen merchants sell to tailors at all. The manufacturer here was not told, either expressly or by implication, that the goods were ordered that they might be sold to tailors. Then is there any authority which establishes that where goods are ordered by a woollen merchant of a cloth manufacturer the latter must be taken to know that they may be ordered to be sold to tailors? The case referred to in the House of Lords is no authority for such a proposition, for there the goods were ordered under the designation of "coatings," which necessarily imported that they were intended to be made up into coats, and therefore the facts of that case came within the precise terms of the fourth rule in *Jones v. Just*, L. R., 3 Q. B. 197. It is suggested that every wool manufacturer is bound to know all the ordinary purposes to which a woollen merchant may put the cloth which he buys—that is to say, he is bound to be acquainted with all the trades to which the woollen merchant may re-sell it; but that is the very proposition which Lord Herschell expressly denies. "It would be unreasonable," he says, "to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used." Though he adds that "there seems nothing unreasonable in expecting that the maker of 'coatings' should know that they are to be turned into coats." And Lord Selborne says, that although, "if the goods being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending on

the method of manufacture, which renders them unfit for the market for which they were intended," the doctrine of implied warranty applies; yet that doctrine "ought not to be unreasonably extended, so as to require manufacturers to be conversant with all the specialties of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them." The Lords decided that case on the ground that it came within the fourth proposition in *Jones v. Just*, L. R., 3 Q. B. 197, which proposition they held to be applicable to a case in which the goods were bought by sample. But here there is no evidence to bring the case within that proposition. The direction of the County Court judge was right, and this appeal must be dismissed.

Appeal dismissed.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 19.

Judicial Abandonment.

Eugène Corriveau, jeweller, Quebec, July 16.

Curators appointed.

Re Jacob Bouchard & Co., manufacturers and lumber-dealers.—P. Baudoin, St. John, curator.

Re Alphonse Levert, jr.—J. M. Marcotte, Montreal, curator, July 11.

Re Narcisse Turgeon.—J. Goulet, Lévis, curator, July 11.

Dividends.

Re Beauchemin & Frère.—First and Final dividend, payable Aug. 9, C. A. Sylvestre, Nicolet, curator.

Re Ferdinand Bégin, Lévis.—Dividend, payable Aug. 4, C. J. Labrie, Lévis, curator.

Re E. E. Bouchard, trader, St. Etienne de Bolton.—First and final dividend, payable Aug. 11, W. J. Breggs, curator.

Re Wm. Bouchard, trader, Chicoutimi.—First and final dividend, payable Aug. 4, H. A. Bedard, Quebec, curator.

Re Charles J. McGrail, grocer, Montreal.—First and final dividend, payable July 31, N. P. Martin, Montreal, curator.

Re Alexis Paquet, trader, St. Ulric.—Second and final dividend, payable Aug. 4, H. A. Bedard, Quebec, curator.

Separation as to property.

Hortense Beauchêne vs. Joseph Poisson, trader, parish of St. Pierre les Bequets, district of Three Rivers, July 18.

Lina Coache vs. Joseph Hébert, tinsmith and trader, St. Hyacinthe, July 14.

The Legal News.

VOL. XIII. JULY 26, 1890. No. 30.

SUPREME COURT OF CANADA.

OTTAWA, June 13, 1890.

Nova Scotia.]

DUGGAN V. DUGGAN.

Will—Legacy under—Contingent interest—Protection against waste.

The will of J. D. contained a bequest to any child or children of a deceased brother of the testator who should be living at the death of the testator's wife. P. D. was the only son of such deceased brother, and during the life time of the widow he brought suit to have his legacy protected against dissipation of the estate.

Held, reversing the judgment of the Court below, that P. D. had more than a possibility or expectation of a future interest; that he had an existing contingent interest in the estate, and was entitled to have the property preserved, so that his legacy could be paid in the event of the interest becoming vested.

Appeal allowed with costs.

E. L. Newcombe, for the appellant.

Borden, for the respondent.

OTTAWA, June 13, 1890.

Nova Scotia.]

POWER V. MEAGHER.

Trustees—Commission to—Rule of law.

Prior to the passing of the Nova Scotia Statute 51 Vic. c. 11, sec. 69, there was no statutory authority for trustees to receive commission for their services when none was provided for by the instrument creating the trust. In a case which did not come within the statute,

Held, reversing the judgment of the Supreme Court of Nova Scotia (21 N. S. Rep. 184), that the English rule of law prohibiting such commission was applicable to, and in force in, that province.

Appeal allowed with costs.

Hon. L. G. Power, appellant, in person.

Henry, Q. C., for the respondent.

DECISIONS AT QUEBEC.*

Vente—Garantie de dettes, troubles, etc.—Radiation d'hypothèque—Vente libre et quitte d'hypothèques—Arts. 1535 et 1065, C. C.

Jugé:—L'acquéreur d'un immeuble, tant qu'il n'est pas troublé de fait, n'a pas d'action contre le vendeur, son garant "contre tous troubles, dons, douaires, dettes et tous autres empêchements généralement quelconques," pour le contraindre à faire radier une hypothèque inscrite avant la vente au bureau d'enregistrement contre l'immeuble vendu (Art. 1535, C. C.) Il en serait autrement si le vendeur avait vendu *quitte et libre* de toute hypothèque. (Art. 1065, C. C.)—*Beaudette v. Cormier*, en révision, Casault, Routhier, Andrews, JJ., 28 fév. 1890.

Copyright—Infringement—Measure of damages.

Held:—Where there is clear proof of the counterfeiting of a copyright, the damages will not be measured merely by the price realized through the sale of the counterfeit, but vindictive damages will be allowed.—*Bernard & Bertoni*, in appeal, Dorion, C. J., Tessier, Baby, Church, Bossé, JJ., Oct. 5, 1889.

Contrat de vente—Réserve de bois—Droit de superficie—Enregistrement et renouvellement.

Jugé:—La réserve, par le vendeur d'une terre, de tout le bois qui se trouve sur une partie de cette terre, et du droit de l'enlever quand bon lui semblera, et de couper et enlever sur une autre partie telle quantité de pieux et de perches qu'il voudra prendre pour son utilité, et ce, tant qu'il y en aura sur ce terrain, constitue un droit de superficie qui est un *jus in re* et non un *jus ad rem*, et n'a pas besoin, pour être conservé, d'être renouvelé au bureau d'enregistrement dans les deux ans qui suivent la mise en force du cadastre.—*Cadrain v. Theberge*, en révision, Casault, Routhier, Andrews, JJ., 28 fév. 1890.

Procédure—Matières sommaires—Articles 5977 et 5869, S. R. Q.

Jugé:—1o. Les réclamations pour ouvrages et matériaux et pour argent déboursé

* 16 Q. L. R.

n'étant pas, aux termes de l'art. 5977 des S. R. Q., des matières sommaires pouvant être instruites comme telles, une action d'assumpsit général contenant ces allégations ne peut pas être instruite sommairement.

20. Mais, si un compte en détail est annexé à l'action et signifié avec elle, et y réfère comme contenant les particularités de la demande, et qu'il ne contienne que des dettes comprises dans l'énumération que fait des matières sommaires cet art. 5977 des S. R. Q., la demande peut être instruite d'une manière sommaire.

30. Lorsque le délai usuel est donné entre l'assignation et le jour du retour du bref de sommation, et que le défendeur n'est pas informé par le bref ou la déclaration de l'intention du demandeur de procéder sommairement, la demande ne peut pas être instruite sommairement. Autrement le défendeur, n'ayant aucun moyen de découvrir si le demandeur, qui en a le choix, veut procéder sommairement ou suivant le cours ordinaire, pourrait être pris par surprise et être condamné sans avoir pu se défendre.

40. Une action d'assumpsit général ne permet pas d'obtenir jugement sur affidavit par le tribunal ou le protonotaire, lors même qu'il y est allégué que le défendeur a reconnu devoir et promis payer la dette; à moins, toutefois, qu'un compte en détail n'ait été signifié au défendeur en même temps que l'action à laquelle il était annexé et qui y référerait comme particularités de la demande.—*Légaré v. Cloutier*, C. S., Casault, J., 6 mars 1890.

Servitude—Right of way—Road used in common—Arts. 540, 549, C. C.

Held:—1. A road established and used from time immemorial by a number of owners of contiguous farms to reach and work them, is different from an ordinary servitude of passage, and does not fall under the rule of Art. 549, C. C., respecting the proof of servitudes by title.

2. In an action *negatoria servitutis* respecting a road on the plaintiff's property, the defendant may plead that the road is one used in common from time immemorial by several contiguous neighbours, of whom he is one,

to reach and work their farms, otherwise inaccessible, and in proof of such a plea oral testimony is admissible.—*Perron v. Blouin*, S. C., Andrews, J., Jan. 16, 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER III.

OF INSURABLE INTEREST, THE SUBJECT INSURED,
AND WHO MAY BECOME INSURED.

[Continued from p. 224.]

In Quebec, a mere chirographary creditor cannot insure his debtor's stock-in-trade, or personal property.¹

§ 114. Partners.

A partner can insure the partnership stock in the partnership name, and bind the insurer, and charge the firm the premiums; but insurance by a partner ought to be for his firm to protect the partnership property. In fact, it is questioned whether if he do not insure he is not liable in damages towards his co-partner, particularly in certain cases, as if one be absent and the other present and managing.

Insurance of my goods, my merchandise, does this cover merchandise of a commercial firm in which I am partner? ² Some say no. Others, including Casaregis and Straccha, hold the insurance good for the value of the interest that the insured has therein. Others, again, hold it good for the whole. *Quia quod commune est nostrum esse dicitur*. If merchandise in ship be insured as *chargées "pour mon compte"* and that of others interested, and I insure simply for myself, firm property in such merchandise will not be covered, says Emerigon. So, if bills of lading be to a firm, insurance in the name of one partner will not cover the firm's property at all.³

¹ *Hunt v. Home Ins. Co.*, Superior Court, Quebec, April 1871. But see *ante*. Hettier says chirographary creditors may insure, but what indemnity they may be entitled to after loss by fire may be very difficult to state. He gives examples.

² Emerigon, Vol. I, p. 298 (Edn. of 1827).

³ Shipowners are not partners.

A partner for a firm insured cotton, property of the firm. By mistake the policy described the partner (the insured) as if insuring his own property. A bill was filed in equity after the fire, to have the policy reformed so as to read for the partnership. *Krieh et al. v. Globe Ins. Co.*, Illinois, 1869; 4 Am. Rep.

§ 115. *Insurance for a person to be named.*

The name of the insured is sometimes kept secret till necessary to be disclosed. *Troplong*, mandat, No. 549.¹ The broker or agent of the insured in such case declares that he takes the insurance for account of a person to be named. Once the person is named the insurance is held to have always been his. *Ib.* Or the insurance may be "pour compte de qui il appartiendra." *Ib.*, No. 554.

Where Peter, without mandate, insures for Paul, Paul's property, his action must be approved "*en temps utile*," or it is valueless. This is to prevent gambling. "*Temps utile*" here is equivalent to *rebus integris*, before the loss. *Ib.* No. 626. But there are cases of implied mandate, and in such cases the *mandant* need not have ratified before the loss. *Ib.* No. 625.

The agent may take the insurance in his own name if the conditions of the policy do not prohibit, but read that insurances generally are for the insured or whoever may be interested.²

§ 116. *Interest, part personal and part as trustee.*

A person having an interest in his own name in part, and in quality of trustee for the rest, may insure all in his own name under a general description. *Phillips*, § 392.³ So (says *Phillips*) a policy on a building described by the assured to be "his mill" was held applicable to his interest both as owner and mortgagee.⁴

¹ Observe: Nature of interest must be specified by our Code, Art. 2571.

² *Browning v. Provincial Ins. Co.*

³ *Hiscox v. Barrett*, cited in 16 East, 145. *Murray v. Col. Ins. Co.*, 11 Johns., is contra.

⁴ *Lawrence v. Col. Ins. Co.*, 2 Peters, cited; and *Iving v. Richardson*, 2 B. & Ad.

Interest of co-partnership cannot be given in evidence to support averment of individual interest.¹

Averment of interest of a company cannot be supported by proof of a contract relating to the interest of an individual.²

In Lower Canada three men may by one policy insure "to the extent of their respective interests for £1,000."

§ 117 *Insurance on joint account.*

Where several are jointly interested, and a policy is made on their joint account, it is not sufficient to state that one was interested, and that the policy was for his account, and where he had got a verdict it was set aside.³

If one own only a fourth of a thing, but insure it generally, he will only recover to the extent of his interest, but he can recover to that extent.⁴

A joint tenant has an interest in the entirety entitling him to insure it, but unless he insure for all expressly he can only recover part of any loss. *Page v. Fry*, 2 Bos. & P. 240.

An insurance by one of several tenants in common will not protect the shares of the others; each of such tenants' interest is distinct from his co-tenants' interest. But, I take it, one can insure a ship property of self and others part owners, and for all, if expressly so insured.

In New York and in Pennsylvania a judgment creditor cannot insure specific buildings of his debtor. It is otherwise in the Province of Quebec.

One of two co-heirs insured a house, property of himself and co-heirs, as owned by assured. He was held entitled to recover only half of the loss.

¹ Per Marshall, Ch. J., 2 Cranch 440. This is the correct principle. The decision by Kent in *Holmes v. U. Ins. Co.*, 2 Johns. R., seems wrong; that one of several partners can separately insure a thing of the firm, and that an averment that he had interest to the amount will be supported by proof of the partnership interest to that amount. See *Lawrence v. Van Horn*, in note to 16 East.

² *Graves v. The Boston M. F. Co.*, 2 Cranch. Graves is insured to the extent of his own interest, but his co-partner is not. *Page v. Fry*, 2 Bos. & P., was refused weight in the above case in 2 Cranch.

³ *Bell et al. v. Anley*, 16 E. R.

⁴ *Lawrence v. Van Horn*, 1 Caine's R.

If one co-heir can be considered agent of the others he ought not to use his sole name as if owner.

§ 118. *Lessee.*

A farmer whose harvest has been destroyed by accident (say hail) may claim reduction of rent from the proprietor, in the terms of Art. 1650 C. C. of Lower Canada, though he may be entitled, for the same loss, to an indemnity from an insurance company. In such a case, the proprietor may be declared without right to profit by this latter indemnity stipulated in a contract to which he was not a party. *Thiroux v. Filion*.¹ Filion had insured against hail. Thiroux contended that a farmer's right against the proprietor to go free of rent ceased on his being paid by the insurance company. The case of *King v. The State Mutual F. Ins. Co.*, (*supra*), differs from that of *Thiroux v. Filion*, it seems, only in this, that the insurance company paid Filion, and did not ask from him subrogation, apparently, and Filion sued his landlord.

Is not Shaw, Ch. J., in the *King* case, in a dilemma? How hold, as he does, and at the same time admit that the mortgagee can only insure to the amount of his debt claim? And again, that if his debt be paid the policy cannot operate?²

§ 119. *Mandataries.*

Troplong, Mandat, No. 624, speaks of the *mandataire* being authorized to go to expense to carry out the *mandat* and to conserve the subject. He may incur necessary expenses, and even *dépenses utiles* must be reimbursed him. Thus he may insure and reimburse himself the moneys paid in premiums. It suffices that insuring was or might be *utile*. Can it be opposed that a *mandataire* without mandate to insure has no right to insure? No, for power is implied, in most mandates, to *soigner*.

¹ Cour de Cassation, 4 May, 1831; reported in Dalloz, Jur. Gén. du R.

² The *Filion* case is not as bad as the *King* case; for Filion was not master to make a hail storm; but King could set fire. King's case is as bad as Harman's, mentioned in Marshall on Insurance, and called there a gaming case (and overruled apparently).

§ 120. *Insurance for owner without his authority.*

One may insure in his own name the property of another for the benefit of the owner without the latter's previous authority. Such insurance will enure to the party's interest intended to be protected, upon his subsequent adoption of it, even after a loss. Angell, § 79;¹ and so in Quebec.

In *Dumas v. Jones*² the policy (a marine one), was in the name of the plaintiff only. It was an insurance on freight valued at \$5,000. The defendant underwrote for \$1,000; five others had underwritten previously for \$2,500. At the trial it appeared that plaintiff's interest was only one-half of \$5,000; another person being interested in the subject insured. Plaintiff was limited to his own loss, and had recovered that from earlier underwriters, before suing Jones. Jones was therefore condemned only to return to plaintiff the premium received on the amount insured beyond the plaintiff's insurable interest.

One of several owners of a vessel and cargo took a policy in his sole name, he intending the insurance for all. On a loss the insurers paid the insured more, considering his individual interest, than he was entitled to, and the insurer was declared entitled to recover back the excess, as paid in ignorance of fact.³

§ 121. *Beneficiary heirs, tutors, etc.*

The beneficiary heir may insure. Tutors may insure, in fact ought to be held bound to do so if in funds. Assignees of a bankrupt's estate may insure. So, churchwardens and trustees may; and the *centui que trust*.⁴

¹ 9 Barr (Penn.) R. On peut faire le bien d'une personne à son insu. Beneficium est etiam invito prodesset. A man may become surety for B towards A without B's knowledge.

² 4 Mass. R.

³ *Pearson v. Lord*, 6 Mass. R. Our article 1047, C. C., would allow so.

⁴ *Hill v. Secretan*, 1 Bos. & Pul. Though the trustee insure, the *centui que trust* may, by the condition, be the person to get the money. Monthly Law Reporter, A. D. 1858, *Brown v. H. Ins. Co.*

§ 122. Pawnbrokers.

A pawnbroker has an interest to insure things held by him in pledge; for he is liable (in the Province of Quebec and in France) even for *faute légère*; but if insured, though there may have been *faute légère*, he will recover the sum insured. Goods in pawn are generally required to be insured as such.¹

§ 123. Innkeepers.

An innkeeper can insure to cover the value of his own and traveller's goods; for if traveller's goods be lost in the inn, or damaged, they are presumed to have been so through the negligence of the innkeeper who must pay.²

§ 124. Agents.

An agent insuring ought to say for those interested, for whom it may concern; for otherwise he may not be able to recover the amount insured. How can he in his own name, having lost nothing? Where he has a lien he may perhaps claim indemnity to the extent of it. It was held in the case of *Cusack v. Mut. Ins. Co. of Buffalo*³ when an agent claims indemnity he will have to declare his interest.

The *negotiorum gestor* may insure but ought to state his quality.

Where an insurance is effected by A as agent for B, nobody is insured but B. If he have no interest at the time of the loss he cannot recover.⁴

An agent may insure simply "as agent." It may be shown afterwards who was principal; but there must not be fraud.⁵

§ 125. Consignees.

An ordinary consignee having a beneficial interest may insure for the benefit of the owner, though a naked consignee, being a mere agent of the consignor, cannot do so, as he can suffer no damage from the loss, as e.g. commission. Only in his principal is

there an insurable interest.¹ He is not like a trustee having the legal interest in the thing.²

In *Crowley v. Cohen*³ it was held that where a consignee or trustee insures as such, he need not specify the exact interest he has; the nature of his interest may be left at large. But it must be observed that by our Civil Code the nature of interest must be specified, (2571).

Whether consignees merely to take possession, but not having power to sell, can insure for themselves or principal is unsettled, says Story, (Agency). Evidently Lord Eldon thought that such consignees could insure, stating the interest in the principal;⁴ and to the same effect is Boudousquie.

Consignees for sale may insure for themselves to the extent of their own interest. They have also an implied authority to insure for their principal.

The better to keep covered what he has on consignment the consignee ought to insure (says Boudousquie) for account of whom it may concern. This will cover any interest existing at the date. As to his commission in expectancy, the consignee may insure that, valued at some sum stated. If his interest be so declared he will recover if a loss happen.

A consignee insuring in his own name insures only his own interest. If he wish to cover the owner as well as himself, he must take a policy as well in the name of the owners as in his own name, or for himself and as agent.⁵ Then, as regards the owner he must sue for himself.

Goods "owned or held in trust or on commission" will cover goods sent and held for sale, and the owner can hold the consignee or trustee accordingly. Angell, § 80. And this is the case though he did not order insurance previously.

¹ *Lucena v. Crauford*, 2 B. & P. 306, 307.

² *De Forest v. Fulton Ins. Co.*, 1 Hall, is approved in *Ebenworth v. Alliance Marine Ins. Co.*, Common Pleas, England, 1873. It follows a good deal *Lucena v. Crauford*.

³ 3 B. & Ad.

⁴ 2 Bos. & P. 324, new R.

⁵ *Cusack v. Mutual Insurance Co. of Buffalo*, 6 L. C. Jur.

¹ Can the pawnbroker charge premium against the pawn? Apparently not.

² *Dawson v. Chamney*, 5 Q. B. Ad. & Ell.

³ 6 L. C. Jurist.

⁴ *Russell v. N. E. M. Ins. Co.*, 4 Mass. R. In the Province of Quebec it would be for B. to sue in case of loss.

⁵ 12 Mass. R.

Aliter, if previously he had refused to pay premiums.

§ 126. *Warehousemen.*

A, a wharfinger and warehouseman, insured goods in his warehouse, and "goods in trust and on commission therein." A had goods belonging to his customers, on which he had a lien for rent and charges, but no further interest of his own. He had never charged his customers' insurance, nor did they know of the policy. The warehouse and goods insured were all consumed. The insurers refused to pay for customers' goods beyond the amount of A's lien. Yet A was declared entitled to get the whole insurance. He would be a trustee for part of it.¹

Troplong, (Mandat) says that an agent charged to buy and ship things may insure, and charge the premium against his principal.

An agent not generally authorized to insure, may, in unforeseen exigencies, acquire a right to insure, to prevent a loss to his principal. Story, Agency, § 141.

In *Waters v. The Monarch Ins. Co.*,² the plaintiffs (warehousemen) not insurers were not liable to the owners of goods which were burnt. But the plaintiffs had insured the whole value of the goods, though their personal interest was only for their charges as warehousemen, for which they had a lien. The insurance company was held liable in full.

Warehousemen and wharfingers may insure goods deposited with them, though without the previous authority of the owners, and the insured are entitled to recover the whole value. Then they must account to the true owners for all except their own interest (say for charges on the goods).³

A warehouseman is *negotiorum gestor* of those who have goods with him, so that if he insure such goods, and get paid, he may be sued by those who had goods. It is not so, however, in England—at law at any rate.

¹ *Waters v. The Monarch F. & L. Ass. Co.*, 5 Ell. & Bl. Also Jurist, A. D. 1856.

² 5 Ell. & Bl.

³ *Watts v. The Monarch L. & F. Ins. Co.*, 34 E.L. & Eq. R.

A ship's husband cannot insure and charge the owners with the premium.¹

A managing owner of a ship has no power to insure and charge part owners with premiums.²

In *Sideaways et al. v. Todd et al.*,³ a wharfinger without the knowledge of the depositor insured goods deposited. The goods were placed with the wharfinger in storage and for sale by him. A fire happened and the goods were lost. The wharfinger received the insurance money. It was held that though he needed not insure,⁴ yet having done so, and received the money he was bound to account to the depositors. He held the goods for them.

§ 127. *Common carriers.*

In *London & N. W. R. Co. v. Glynn*,⁴ the plaintiffs, common carriers, insured goods "their own and in trust as carriers," against all loss that the assured should suffer by fire on the property particularized in the policy. It was held that, to the amount of the policy, the whole value of the goods in plaintiffs' possession as carriers was insured, and not merely their interest as carriers; and that plaintiffs would be trustees for the owners of the goods of the amount recovered, less plaintiffs' charges as carriers, and in respect of the goods.⁵

In *Crouley v. Cohen*,⁶ an insurance "on goods" was held sufficient to cover the interest of carriers in the property under their charge; for in general, if the subject of insurance be rightly described, the particular

¹ *French v. Backhouse*, 5 Burr.

² *Bell v. Humphries*, 2 Starkie R.

³ 2 Starkie R., p. 400.

⁴ Above it is said "though he needed not insure." But query; for he really had two qualities: he was agent to sell, as well as wharfinger, and a commission on sales was agreed for. As to fire insurance, wharfinger's liability, the decision of the Master of the Rolls was affirmed, *N. B. & Merc. Ins. Co. v. Liverpool, L. & Globe*, 36 L. T. 623. (A. D. 1877).

⁵ 1 Ellis & Elliot, A. D. 1859.

⁶ See also *London & N. W. R. Co. v. Glynn*, 1 Ell. & Bl. 5 Jurist N.S., in which it was held that carriers may insure goods entrusted to them, and to their full value, and not merely to cover their charges. But they must insure the goods as in trust, and for themselves in so far as interested.

⁷ 3 B. & Ad.

interest need not be stated, (but there may be a condition reading otherwise or a code enactment).

In France, in the case of nominal insurance by broker, the principal may sue, and the insurer need not say the contrary.¹

§ 128. *Fol enchérisseur.*

In Quebec a *fol enchérisseur* may insure for his own benefit, but once the re-adjudication has taken place at his *folle enchère*, if the house burn the company is free, for the insured is dispossessed.²

§ 129. *Borrowers.*

The borrower of a thing may insure it. The loan of it being for his sole advantage, if it be lost he has to pay, and negligence is to be presumed against him (in the Province of Quebec).

§ 130. *Vendors.*

The vendor, so long as he has or retains right to stop *in transitu*, may insure. The vendee, after the vendor's stopping the goods *in transitu*, has no insurable interest.³

§ 130. *Re-insurance.*

The insurer is a kind of *caution* and may as such get another person to assume his risk; re-insurance is allowed. The insurer has an insurable interest and can re-insure, to protect himself. Such re-insurance may be partial, or total, and at rates and conditions different from the original insurance. It is a contract between the first or other insurer and the re-insurer. Such is the law of France and Lower Canada, 2477 C. C., and of the United States.

Re-insurance is common in England. It

¹ 2 Pardessus, Dr. Com. pp. 569, 570. See Arnould on Insurance, p. 138.

² Sirey, A.D. 1856, p. 451.

³ *Clay v. Harrison*, 10 B. & C. But query; for stoppage *in transitu* only acts to make a lien. The vendee can get the goods afterwards if he tender the price. 2 Kent Comm. And the vendor after stoppage *in transitu* may sue for the price. See *Martindale v. Smith*, Benjamin on Sales, p. 660. The effect of stoppage *in transitu* is to restore the goods to the vendor's possession, not to rescind the sale. The vendor may hold the goods till the price be paid. He has not a right to rescind the bargain.

is common for one office to take any large risk, and to re-assure say 50 or 60 per cent. with other offices willing to run the risk of a portion. It is said not to be the interest of the insured to insure a large amount in one office; that he had better divide his insurance, and not be, in the event of loss, at the mercy of one office. Where insurance is divided, there will be an honorable competition, it is said, in the settlement of the loss, among the several insurers. That may, or may not, be. I have seen an insured, insured by three policies, have to fight all three of the insurers till final judgments in appeal, and all the three combine to resist each of the insured's actions.

CHAPTER IV.

WHO ARE BOUND TO INSURE.

§ 131. *Agent undertaking to procure insurance.*

Where insurance is undertaken to be procured for another person by an agent, the general rules in the law of principal and agent will govern. In Lower Canada, if a person, even voluntarily and without reward, undertake to procure insurance to be effected, he will be answerable for negligence; and in England though there be no consideration moving to the person who has gratuitously undertaken to procure an insurance or to get a policy transferred, if this person proceeds to carry his undertaking into effect by getting his policy underwritten, etc., but does it so negligently that the insured can derive no benefit from it, as, for instance, if he have promised to get a policy transferred, but neglects to have it properly indorsed or admitted by the insurer, an action will lie against him.—(1. Esp. R.—2 T. R.)

An executor who drops a policy on the testator's estate, is held liable on a loss happening.¹

§ 132. *When agent is bound to insure.*

An agent may be bound to procure insurance for his principal, either by express agreement, or by an implied one. Such last would be the habit of the agent in dealing

¹ *Garner v. Moore*. Also *Hawkins v. Coulthurst*, 5 B. & S.

with his principal, an usage in the business in which the agent is engaged, or in the country of his residence, the custom of merchants, etc. Story, Agency, §190. Otherwise the agent is not bound.¹

In England agent charged to buy and ship things must insure, and may debit principal.

Where the course of dealing between the principal and the agent is such that the latter has been used to effect insurances by direction of the former, he is bound to comply with an order to insure, though he have no effects in hand at the time of receiving the order, unless notice has been previously given by him to discontinue that mode of dealing. If he have effects in hand he cannot in any case refuse to comply with the order; or, if the bills of lading from which his authority is derived contain an order to insure, this is an implied condition which the agent must fulfil if he accept the employment.² The mere endorsement, by the consignee, of the bill of lading is such acceptance.³

THE LATE MR. J. S. HONEY.

It is now eight years since Mr. Honey celebrated the fiftieth anniversary of his connection with the prothonotary's office in Montreal. At the commencement of the long vacation he has passed away, after a very brief illness, at the ripe age of 78. He was in his usual place in the Court of Review on June 30, the last day of the legal year, and he continued in attendance at his desk until Saturday, July 12. On Monday he was no more. Montreal has been noted for long tenure of office by its legal officials. The little band has been sadly thinned during the last few years, and Mr. Honey has now followed Messrs. Monk,

Coffin, Terroux, Pyke, Campbell, Vilbon, and others long associated with him. During his long term of fifty-eight years he has been a model of patient assiduity and unfailing courtesy, and the courts in which he was wont to sit, as well as the office in which he so long reigned, will for a long time to come wear a strange aspect without his familiar presence.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, July 26.

Judicial Abandonments.

A. Hubert Bernard, trader, St. Jean, l'Isle d'Orléans, July 24.

Curators appointed.

Re J. B. Denis.—C. Desmarteau, Montreal, curator, July 15.

Re Camille Lamarche.—J. M. Marcotte, Montreal, curator, July 22.

Re Joseph Massé.—C. Desmarteau, Montreal, curator, July 17.

Re G. L. Paradis & Co., Roberval.—J. B. Letellier, Quebec, curator, June 30.

Re Adolphe Parent, trader, St. Elphège.—O. A. Sylvestre, Nicolet, curator, July 17.

Re W. E. Potter, Montreal.—Kent & Turcotte, Montreal, joint curator, July 22.

Re George Stewart, absentee.—C. Desmarteau, Montreal, curator, July 19.

Re The Dominion Safety Boiler Co.—J. McD. Hains, Montreal, curator, July 11.

Dividends.

Re Duncan Everett Dewar, Aylmer.—First and final dividend, (13c.) payable August 11, at office of Mutchmor, Gordon & Co., Ottawa.

Re Pierre Avila, Gouin.—First dividend, payable August 13, T. Darling, Montreal, curator.

Re Allan J. Lawson, Montreal.—First and final dividend, payable August 11, A. W. Stevenson, Montreal, curator.

Separation as to property.

Caroline Bouchard vs. Nephtalie O. Rochon, Montreal, July 10.

Cordelia Moreau vs. Edouard Lescarbeau, Montreal, July 22.

Dorila Sicotte vs. Napoléon Vallée, clerk, Montreal, July 22.

A PLAINTIFF IN PERSON.—An amusing scene occurred in the Sullivan county (N. Y.) court house recently. The wife of one of the parties to a suit was on the witness stand and had entrusted her baby to the care of another woman, who was tending it in a room below. The child became restless after awhile and announced its desire to see its mother in notes of unmistakable pathos, which might be traced to hunger. After trying in vain to quiet the child the woman came up stairs and into court, the baby all the time crying at the top of its lungs. Judge Thornton exclaimed "Take that child out of court." The woman addressed continued to advance, and holding the youngster out to its mother over the head of a prominent lawyer, responded "Court or no court, this child has got to be attended to."

¹ *Lee v. Adair*, 37 N. Y. Rep: 10 Tiffany's Rep: Agent not bound to insure for principal unless specially instructed, or an understanding be shown that it shall be done. A ship was owned by three persons in equal shares. A, one of the owners at her port of departure, has always insured her upon her departure on voyage. At her last departure he omitted to do so, and the ship was lost. Have the other owners an action against A? Yes, for he has *manqué* to *mandat tacite*, No. 141, Troplong, *Mandat*.

² 27 Russel. *Smith v. Lascelles*, 2 D. & E.

³ 3 Camp. 472.

The Legal News.

VOL. XIII. AUGUST 2, 1890. No. 31.

The weight to be given to the evidence of professional informers was considered by the Supreme Court of Iowa in *Dickenson v. Bently*, June 4, 1890. The Court held that the fact that a person is employed to visit places and purchase whisky in order to ascertain if saloons are illegally kept, is no ground for discrediting his testimony in a suit against the vendors for maintaining a liquor nuisance. "Is there," asked the Court, "anything dishonorable or unmanly in a faithful, conscientious discharge of such duty? If thieves were preying upon the possessions of the people, would it be dishonorable for a person to accept employment to procure the testimony that would result in the conviction of an actual thief? If murderers abound, and their detection is difficult, is an employment that will bring to light the evidence upon which the truth may be known, and the guilty punished, dishonorable? A statement of strong cases wherein good men have no sympathy sometimes aids us to better understand milder ones, as to which the sympathies of men may be directed. We must believe that all good people would commend an employment or service that would result in the prompt and sure punishment of persons guilty of these graver crimes, and such persons would as promptly condemn any employment or service which would result in the punishment of the innocent."

The *Law Quarterly Review*, referring to the subject of champerty and maintenance, says the law as it stands does undoubtedly tend to deprive the poor of a means of meeting the rich on equal terms in litigation by obtaining the assistance of others who believe in the probable success of their suit. "The consequence is, that in many cases a poor suitor (not, perhaps, quite poor enough to sue in *forma pauperis*, and even if he were,

not able to afford expenses unavoidable even in that case) is either forced to give up all idea of enforcing his right, or is driven into the hands of the hedge-lawyers. . . . Without expressing a definite opinion, it is not going too far to say that it is at least a matter worthy of consideration whether the law of England should not be assimilated to that of India by enacting that the mere fact of maintenance or champerty shall not of itself be illegal. . . . It is not to be expected that a solicitor will readily undertake to promote a claim involving considerable outlay, and, however honest, some risk of failure, when his client is unable to provide money, merely on the chance of getting his ordinary costs in case of success."

In Mr. Longpré the district of Montreal had a prothonotary who introduced several useful reforms in the administration of his office. It is to be regretted on public grounds as well as for his estimable qualities as a citizen, that his career should so soon have been brought to a close.

COUR DE MAGISTRAT.

MONTRÉAL, 26 mai 1889.

Coram CHAMPAGNE, J. C. M.

BOW v. LEGAULT.

Pari—Courses de chevaux—Prêt—Droit d'action.

JUGÉ:—*Qu'une personne qui prête de l'argent à une autre pour lui permettre de faire un pari sur une course de chevaux, a droit d'action pour recouvrer ce montant, ces sortes de paris n'enlevant pas le droit d'action. C. C., Arts. 1927, 1928.*

Le demandeur a prêté \$10 au défendeur pour sa mise dans un pari pour une course de chevaux, et poursuit maintenant le défendeur pour se faire rembourser l'argent ainsi prêté.

Le défendeur plaide que le demandeur lui a prêté cet argent sachant que c'était pour un pari dans une course de chevaux, et qu'il n'a pas d'action pour se faire rembourser.

La Cour a maintenu l'action, plaçant ce

cas dans l'exception prévue par l'article 1927 du Code Civil.

Jugement pour le demandeur.

McGibbon, avocat du demandeur.

Ethier & Pelletier, avocats du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, 2 mai 1889.

Coram CHAMPAGNE, J. C. M.

THIBAUT V. LEFEBVRE.

*Locataire et sous-locataire—Saisie-gagerie—
Dommage.*

JUGÉ:—*Qu'il n'y a pas lieu à accorder des dommages contre un locateur qui, de bonne foi, prend une saisie-gagerie contre un sous-locataire pour un montant de loyer dû par le locataire principal, quand même le sous-locataire ne devrait rien et avait légalement payé son loyer au temps de la saisie-gagerie au locataire principal.*

PER CURIAM:—Le défendeur ayant loué une maison à un individu qui après l'avoir occupé quelques mois l'a sous-loué au demandeur, a pris une saisie-gagerie contre les meubles du demandeur qui se trouvaient dans la dite maison, pour se faire payer des mois de loyer dûs pendant l'occupation du sous-locataire. De là, poursuite en dommage pour \$50 contre le défendeur. Par l'article 1621, C. C., le défendeur avait le droit de prendre cette saisie-gagerie contre les meubles du demandeur, son sous-locataire, et il n'y a pas lieu lorsque le sous-locataire a payé légalement au locataire principal, pour cela à accorder des dommages.

Action déboutée.

L. N. Demers, avocat du défendeur.

L. S. Descarries, avocat du défendeur.

(J. J. B.)

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER IV.

WHO ARE BOUND TO INSURE.

[Continued from p. 240.]

§ 133. *Consignees, Commission Merchants.*

One of the most important duties which the safety of merchandize requires in factors

and consignees who act as factors is that of protecting it by insurance. (Paley by Dunlap [18]).

Shaw (upon Ellis) cites several cases in which in the United States it has been held that by the custom of merchants it is the duty of a consignee or commission merchant to insure the goods of his consignor, though he may have received no express directions to that effect. Story, Agency, § 111, says that consignees for sale are not positively bound to insure, unless they have received orders so to do, or the usage of trade, or their habit of dealing with their principal, has raised an implied obligation to insure. In the Louisiana Annual Reports of 1855 there is a case in which this was held.

A commission merchant is not bound to insure for his principal if not ordered. 3 Ch. Commercial law. But by general usage in a place, might not a commission merchant be held bound to have insured? Story says, yes; if the usage be general. See Paley on Agency, 18.

§ 134. *Insurance must be valid and effective.*

An agent or consignee procuring insurance must procure valid insurance, and insurance with solvent insurers, and communicate their names.¹

If a man covenant to keep insured, his procuring a mere slip unstamped, or an unstamped premium receipt, will not in England satisfy such covenant, unstamped papers not making legal insurance.² A policy stamped (or interim receipt stamped) alone can make such an insurance. But in Lower Canada no such Stamp Acts exist, therefore insurance by slip or mere receipt for premium is good, for the case of such a covenant.

Question was as to right of plaintiff to enter up judgment and execute it. It was held he might; breach being of covenant to keep insured.³

The above defendant had no right to proceed, even at equity, to compel the insurers

¹ Boulay Paty, Tom. 3. *Hurrell v. Bullard et al.*, Q. B. Guildhall, Feb., 1863.

² *Xenos v. Wickham*, 14 C.B. Rep. cited.

³ 10 Jurist, N. S., *Parry case*.

to execute a policy stamped (in pursuance of unstamped slip).

Where there is a covenant to insure, if the covenantor do not act promptly and pay the premiums, the covenantee may pay them and sue for the amount.¹

In Louisiana, it is held that no bailee is liable to insure unless he have instructions to do so. *Duncan v. Boye*, 17 Ann. Rep. Yet he may have to pay sometimes, if fire occur, and he had better insure, apparently, (for himself, at his own expense).

If a man agree to keep insured, and get delay in consequence, he must not allow the property to be uninsured even for two days; else he breaks his agreement and his delay ceases.² This treaty is frequent where compromises are made.

By covenant people may bind themselves to insure, e.g., a tenant may, often does, under pain of forfeiture of lease. Such covenants are strictly enforced.³

And if a lessee bind himself to insure in the joint names of himself and lessor he must do so literally. Mere verbal evidence of the lessor saying that he would be satisfied with less (evidence of waiver pretended) is *nil*. (*Ib.*)

So a purchaser of a house, paying part, promising always to keep insured, for security extra of balance, failing to do so must pay balance if that be stipulated.

The plaintiff, a lessee, promises to keep insured. He does not. The landlord insures. No fire happens. Afterwards the landlord charges the tenant. It was held that he has no right to be repaid specifically the money spent by him in premium of insurance; unless as a kind of nominal damages. The jury, in this case, gave the plaintiff nominal damages against the lessee, viz., the very amount the plaintiff had expended (in reality more than nominal damages). But this verdict the Court would not interfere with.⁴

§ 135. *Gratuitous mandatary.*

In the United States a mere gratuitous

promise to insure, unconnected with any relation of principal and agent subsisting between the parties, or with any duty arising from usage, is not binding, provided the promisor does not enter upon its performance. Such gratuitous mandatary can only be held liable for misfeasance, not nonfeasance,¹ and so it would be in England. But in Lower Canada it would be otherwise.

The *negotiorum gestor* ought to declare his quality, and insure.

In the United States and England, if such agent or person attempts to fulfil his promise, and is guilty of gross negligence or unskilfulness in the execution of his voluntary trust, he will be liable to the other party in an action on the case for all damages resulting from such negligence.²

But when the situation or profession of the one who makes this gratuitous offer is such as to imply skill, as if, for instance, he is an insurance broker, or known to be well acquainted with the business of insurance, an omission of that skill will be held to be gross negligence.³

§ 136. *Effect of usage.*

Usage undoubtedly may impose obligation to insure. Neglect to effect insurance where the usage is and has been to insure will give an action of damages. By a general custom of the trade a printer may be bound to insure paper and printed work of a work that he is printing for an author or third person. True, that in *Mawman v. Gillett*⁴ no such custom having been proved the printer got free.

§ 137. *Joint owners, etc.*

Plaintiff and the defendants were joint owners and partners in a ship of which the defendants had the care and exclusive possession. Defendants had insured plaintiff's interest and their own; subsequently they

¹ *Mayne on Damages*, p. 200. *Hey v. Wyche*, 12 L. J. Q. B. 83.

² *Perry v. Great Ship Co.*, English Jurist of 1864.

³ *Dee v. Gladwin*, 6 Q. B. R.

⁴ *Hey v. Wyche*, 2 Gale & Dav. New York Legal Observer, Vol. 2, p. 285.

¹ 4 Johns. 84.

² *Tracy v. Wood*, 3 Mason, 132; *Thorne v. Deas*, 4 Johns. 84.

³ *Skiele v. Blackburne*, 1 H. Bl. 158; *Wyld v. Pyckford*, 8 Mees. & Wels. 443.

⁴ 2 Taunt.

insured for themselves and not for plaintiff; they were held liable in damages, as for negligence, and because they ought not to have discontinued insuring for plaintiff, without notice to him.¹ See Domat, Liv. 1, Tit. xv, sec. 3, art. 4.

If two accept a procuration they are liable *in solido*, if *préposés*, for instance, to keep safely a house or a thing.

If a vendor at a distance from the vendee has, in former transactions, insured the goods sold, or if he receive instructions to insure, he must insure.²

In *Mawman v. Gillett*³ it was held that printers getting from booksellers paper, are not bound, in the absence of contract, to insure for the booksellers the paper of the works that they print.

§ 138. Tutors.

Are tutors to minors bound to insure their ward's property? I would hold them bound, generally. *Quotiescunque non fit nomine pupili quod quis paterfamilias idoneus facit, non videtur defendi*; l. 10, Dig. De adm. et per. tut. Certainly a tutor, careful about his own property and insuring it, ought to insure his ward's. Certainly, if property left by a father be insured and the policy, after the death of the father, expire with notice to the tutor, if he have funds of his ward he must insure.

According to Rolland de Villargues,⁴ a tutor is not bound to insure his minor's property. As to the tutor's responsibility, it is not to be that of extreme diligence of a *père de famille*. Yet he is bound to renew registrations (*ib.*), and I would say to keep up insurances.

As to the tutor, he is responsible if guilty of *mauvaise gestion*. Art. 290 C. C. of Quebec. This is reasonable. Certainly if, having funds in hand and being in the habit of insuring his own property, he do not insure his ward's, and it be burnt, the tutor ought to pay, being in fault. So if he be appointed tutor to minors owning houses always kept

insured by their father, and he (the tutor) fail to renew, though the father never did insure, or had so much property that he was always his own insurer, the tutor may not go free. Because he (the tutor) is guilty of *mauvaise gestion*. This is clear.

The modern law of France makes the *héritier par bénéfice d'inventaire* liable in his administration only for *fautes graves*. He need not insure, C. N. Art. 804. But Art. 673 of our Civil Code puts upon the beneficiary heir the care of a prudent administrator. It obliges the guardian of *chose d'autrui* to all the care of a good father of a family (the omission of this care is *faute moyenne*), C. N. Art. 1137.

The tutor to minors is bound to observe the same care and he is responsible for bad administration (*semble*, he is bound to insure, C. N. Art. 450, 290 C. C. of L. C.). Yet the Court of Besançon held that neither tutor nor *usufruitier* was bound to insure, there not being breach of positive obligation. But the Court added, if the tutor insure, and then fail to continue, he will be held liable, in case of a house insurance. Moveable property only was in question, and in the case judged, as he had never insured it, he was held free.⁵

§ 139. Trustees, Executors, etc.

Are trustees bound to insure? Yes, under many circumstances, and where they are in funds they ought to.

In *Garner v. Moore*⁶ an executor without special authority applied the testator's assets for several years in insuring the life of a debtor to the estate. He then dropped it without consulting anybody. He was held liable for the sum that would have been received had he kept up the policy.

In *Fry v. Fry*⁷, the testator, as a lessee, bound himself to insure. He allowed the insurance to expire 25th March. He died on the 27th March, without the insurance

¹ *Ralston v. Barclay et al.*, 1 Cond. R. La. p. 519.

² *Smith v. Lancelles*, 2 D. & E.; *Cothay v. Tate*, 3 Camp.

³ Note on p. 325, 2 Taunton.

⁴ Dist. Vo. Ass. Mar. No. 21, § 2. Grun cited, 170.

⁵ Bioche, Vol. 29, Art. 818.

⁶ 3 Drew. 277; 24 Law Journal (Chancery) 687.

⁷ 27 Beavan. The case is cited on p. 79, Digest of English Jurist for 1860. Reported also in 28 Law Journal (Chancery).

having been renewed. His executors did not effect any insurance. A fire took place 26th May. It was held that the executors were not personally liable.

Query, is an executor bound to insure houses more than the lives of debtors of his testator? Yes; insurance on lives of debtors is rare.

§ 140. *Creditors — Common carriers — Pawnbrokers.*

Is a creditor holding a house *ut in pignore* bound to insure it? He is liable even for *faute très légère*, says Merlin. So, he says, is a partner. Yet he does not support the doctrine that they are bound to insure.¹

Common carriers generally are liable in England, if goods entrusted to them be burned, even by accident (unless, indeed, by lightning). So they ought to insure. A carrier is in the nature of an insurer, said Lord Mansfield.

In England, under the Pawnbrokers' Act of 1872, pawnbrokers must insure, and may do so to the extent of the estimated value. The person holding a pledge is bound to use the diligence of a diligent *pater-familias*. If a fire happen he is to prove that he was in no fault. Even then I would hold him bound to insure,—certainly if, habitually, he insured his own goods.

If fire happen, the pawnbroker, in Lower Canada, must prove that he could not prevent it; if *faute even légère* can be shown against him he is bound to pay. A depositary, in Lower Canada and in France, is only liable for *faute lourde*; a pawnbroker for *faute légère*. Even in England a pawnbroker is liable for loss by fire if he be negligent or in default.¹

§ 141. *Directors of Joint Stock Companies.*

I would hold the assignee of a bankrupt's estate, as he is bound to take care of it, liable in damages for bad gestion; and not insuring stock I would consider such; and buildings if insurance of them would profit the mass, but not otherwise.

¹ It has been seen that if a mortgagee officiously insure, he cannot recover the premiums from the mortgagor. *Dobson v. Laid.*

¹ *King v. Loring*, 1 Nev. & Mann, per Parke, J.

When is there fault in such persons? What is due diligence or care? This is best to be decided by a jury, says Bell, Princ. No. 232; and Proudhon says¹ "by judge exercising office of jury."

CHAPTER V.

THE POLICY.

§ 142. *Policies—Open and valued.*

Policies are either open or valued. An open one contains no declaration of the value of the subject insured, or of the insured's interest, and under it the insured has the burden of proving the value and loss, when a loss happens. A policy is valued when it has admitted, or specified, in it a sum as value of the subject insured, or of the insured's interest, as when the policy reads to cover goods "worth £500 value fixed," or "valued by all parties," or "valued at £500 without further account."

§ 143. *What may be recovered under an open policy.*

Most policies are open. Under such, when goods insured are lost by fire the insured gets the actual value of them. Quinn sued the Equitable Fire Insurance Company in the Superior Court, Quebec, upon a policy by which he, a block maker, insured his stock, consisting of blocks, for £200. He obtained judgment for that sum. By the policy the insurers agreed to pay the insured "all such loss or damage as he should suffer from fire," &c. Quinn claimed the value of the blocks in the market. The Company contended that it was liable only for the cost of them, particularly as Quinn had made no insurance on profits. Quinn proved the value of the blocks burnt to have been £200. The cost of them was proved to have been much less. The insurers appealed, at the same time offering Quinn £100 with interest and costs. In March, 1861, the Court of Queen's Bench dismissed the appeal.²

¹ *Droits d'usage*, No. 1523.

² See *Harris v. Eagle Insurance Co.*, 5 Johns.

§ 144. *What may be recovered under a valued policy.*

A valued policy proper involves an agreement by which a fixed value is substituted for an actual one. What is the force of such an agreement? In modern France the insurer under it cannot be debarred from the right to prove less value, or less loss. Boudousquie, No. 146, calls a clause containing an agreement to hold absolutely to the value stated in the policy a most abusive one. In England the writers were and are not clear. Marshall (after Lord Mansfield) stating that the value inserted in a valued policy is "in the nature of liquidated damages," goes on to say that the effect of the valuation is such that "it fixes the amount of the interest of the insured in the same manner as if the insurer were to admit it at a trial." Is not this going too far? We know what liquidated damages are. We know also the force of an admission at a trial, and that it estops a party from making proof at the same trial contrary to his admission. Marshall afterwards says that the value in such a policy ought only to be taken as *prima facie* evidence of the amount of the interest of the insured, "for though the value is admitted by the insurer, yet as he admits it upon the mere representation of the insured, if he find that this was fallacious, that it was factitious and only a cover for a wager, it cannot be supposed that he is so far concluded by his admission as not to be at liberty to dispute the value. Valuation is rather the fixation of a maximum, says Angell. Bell (Comm.) says that a valued policy as much as admits the amount put in hazard, which unless challengeable as fraudulent, or exceptionable as a wager, will be held conclusive in the case of total loss.

McNair v. Coulter was a Scotch case appealed to the House of Lords. The insured had a policy upon a ship and cargo "valued at £1,000, without further account." The House of Lords held this to be a valued policy. The Court of Session had held the insured entitled only to part of the £1,000, equal to the damage proved to have been sustained by the loss of the ship. The House of Lords reversed the judgment, and McNair got the

£1,000 less a trifling sum, value of what had been recovered of the subjects insured.¹ Fraud was pleaded and was pretty apparent, yet the House of Lords held the valuation in the policy conclusive on both parties. Lord Kenyon expressed himself strongly against opening valued policies, particularly where fraud was not shown.²

§ 145. *Valued policies in the Province of Quebec.*

Article 2575 of the Civil Code of Lower Canada allows special valuation to be conclusive. The value must be established, it says, after fire, according to the policy conditions and the general rules of proof, "unless there is a special valuation in the policy."³

In Lower Canada, as in old France, the value stated in a valued policy is only presumed fair and just until the contrary be proved. The insurers are free to prove less value, though opposing to a plaintiff's demand only a plea of exaggerated or too large demand. Under this system, in case of total loss of a thing insured by a valued policy made in good faith, the insured may sue to recover the sum insured, and the defendant may content himself with pleading less value than that of the policy. The plaintiff would be at first bound only to exhibit the policy, but proofs of less value, made by the defendant, could not be disregarded. Emerigon was not for favoring insurers making bargains by valued policies; he was against listening to them when urging fraud, after a loss, and offering proofs by witnesses only, or experts. (Tom. 1, p. 280, quarto, by Boulay Paty.)

If A procure one insurance from B by valued policy, insuring £600 on ship valued at £6,000, and subsequently make another insurance for £6,000, valuing ship at £8,000, and total loss happen, and ship be worth £8,000; let A collect first his £600 and subsequently his £6,000, making in all £6,600. But if he first collect his £6,000, I cannot see right by him to ask his £600; for between him and B, insurer for £600, there has been agreement that, on all occasions, between

¹ 6 Brown's Cases in Parliament.

² 2 East, 114.

³ 1 Bell, Comm., 542-3 cited.

them, the ship is to be held of the value of £6,000 and no more; and A, having received that, is without interest as against B. *Bonsfield v. Barnes*¹ I cannot approve, though Bonsfield might have recovered his whole £6,000 by merely suing firstly Barnes, before touching the £6,000, amount of his (Bonsfield's) other insurance. But I do approve *Bruce v. Jones*.²

§ 146. *Decisions on the subject of valued policies in England.*

The case of *Tobin v. Harford*, in the Exchequer Chamber (A. D. 1864), was an appeal against a decision of the Court of Common Pleas, which ordered a verdict for the plaintiff to be set aside and entered for the defendant. The action was brought by a merchant against an underwriter, on an insurance of cargo on a valued policy. The policy was for all times, at all seasons, with whatever cargo, with leave to discharge or otherwise at all or any ports on the coast of Africa at a certain sum of £8,000. It was contended that in the absence of fraud there could be no objection to this contract, and that the underwriter was liable for the £8,000. The decision in favor of the defendant was, however, affirmed. "Suppose only two muskets of cargo," said Chief Baron Pollock.

*Barker v. Janson*³ was a case of valued policy. A ship valued at £8,000 was insured for £8,000, and was not worth half. The ship was totally lost. No fraud or wagering was proved. The verdict was given for £8,000, and this was maintained by the Court.

In *North of England Iron S. S. Ins. Aem. v. Armstrong*⁴ it was held that a valued policy means that, for all purposes, the value shall be held to be the sum named—no more, no less,—as between insurers and insured. So, if a ship valued at £6,000 be insured, and totally lost; and having been worth £9,000, that sum is recovered against another ship by name of damages for sinking the insured one, the £9,000 must go to the insurers; who only paid £6,000.

¹ 4 Camp. 229.

² 9 Jur. 628, (A. D. 1863.)

³ Common Pleas, England, January, 1868.

⁴ Law Rep. 5 Q. B. (A.D. 1870).

§ 147. *Where value is stated in good faith.*

The general rule is that the claim cannot exceed the amount of the loss; but the parties may agree upon an arbitrary value; and in the absence of fraud this will be the measure of the liability of the insurers.¹ It was held by Lord Mansfield in *Da Costa v. Frith*² that where a valued policy has been obtained in a fair way, and without fraud or misrepresentation, the insurer having so agreed, is concluded from disputing it.

In a case of *Alsop v. Commercial Insurance Co.*, decided by Story, J., it was held, if the plaintiff expected more goods than in reality were shipped, and valued his profits accordingly, then the insured, though the policy be a valued one, is only entitled to recover *pro rata*, according to the proportion between actual shipments and the expected or supposed ones. It was also held in the same case that a designed gross overvaluation is a constructive fraud and avoids the policy; and a trivial interest will not save the policy; nor will a substantial interest where intent to defraud is clear. Gross overvaluation, if suggested as a question of fraud, is solely for the jury.³

¹ Bunyon, p. 15; *Irving v. Manning*, 6 C. B.; *Bonsfield v. Barnes*, 4 Campb. Yet, says Bunyon, valued policies are very rare. The *onus*, even where values are in list of things insured, is on the insured to prove loss by values. (*Id.* p. 15.)

² 4 Burr.

³ In marine insurance, by valued policies, more than the actual value can be recovered, and over-insurance is facilitated. Mr. G. S. Gibb, in an article in the *Law Magazine* for February, 1876, complains that no checks exist, by law, upon over-insurance. Insurers ought, he says, to be allowed to open the policy. The case of *Lucena v. Crawford*, he remarks, contains the best exposition of the nature of marine insurance. The value of a ship—what she could be sold for at the time of the loss—he considers the fair and proper limit of the insurer's liability. Yet a ship may be worth more than her selling value, he says. As in the case of the *The African S. S. Co. v. Swanzy*, 25 L. J. Ch. 870; *Grainger v. Martin*, 31 L. J. Q. B. 186; 4 B. & S. Exch. Chamber. In this case the insurance was for £16,000 on a ship valued at £17,000. She was damaged and abandoned. The ship had cost £20,000. What could such a ship be built for and brought to a person, may be nearer the proper value than the selling price. *Irving v. Manning*, 6 C. B.; 1 H. of L. cases; the parties may agree to value by way of liquidated damages.

§ 148. *Insurance of profits.*

In the case of insurance of profits, a great overvaluation of them will not avoid the policy; but if the overvaluation be for the purpose of fraud it may.¹ It is not sufficient that doubt should exist whether the overvaluation was innocent; it must be seen that it was fraudulent, in order to avoid the policy.²

In the case of *Bruce v. Jones*,³ the defendant had insured the plaintiff for £125 by a policy on a ship valued at £3,200. The plaintiff, before suing, had received from other insurers £3,126.13.6, and now was allowed against Jones only £73.6.6. The amount which the plaintiff may recover in such cases may depend upon the order in which he proceeds against the different underwriters.

§ 149. *Where there have been fraudulent representations as to value.*

A valued policy obtained upon false and fraudulent representations by the insured as to the value of the subject insured ought to be held null and void. Some companies stipulate by their policies that "in a valued policy, an overvaluation shall render absolutely void a policy issued upon such valuation."

§ 150. *Fraud not presumed unless overvaluation be excessive.*

There is not, in Quebec, a presumption of fraud against one who insures a thing for more than its real value. The presumption is rather that he has done so with no bad faith. If fraud be alleged it must be proved. Men, it is said, differ as to values, and insurers may gain by overvaluations. But if the insured overvalue and persist in a valuation greater than his loss, particularly under an open policy, the appearances of good faith diminish. But a slight excess ought not to

¹ So held by Story, J., in *Alsop v. Commercial Ins. Co.*, 1 Sumner R. The case of gross overvaluation as a question of fraud is solely for the Jury; *Id.* Overvaluation by mistake, it seems, will not avoid the policy, *Id.*; observations of Story, J.

² *Alsop v. Commercial Ins. Co. supra.*

³ 9 Jurist. (A.D. 1863.)

be regarded. In the old marine insurance cases, Emerigon was for holding that the excess should be of a fourth at least, to be regarded.¹

Phillips, § 1183, holds that the fact of property being valued too highly is not, under the English law, of itself, a badge of fraud; but Marshall, after Lord Mansfield, says, if much overvalued it must be with a bad view. Kent says that if the valuation be grossly enormous it gives rise to a strong presumption of fraud.²

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 2.

Judicial Abandonments.

William H. Arnton, auctioneer, Montreal, July 29.

William Beattie, trader, Melbourne, July 23.

François Bourgoing, trader, Tadoussac, July 31.

Appolinaire Morency, tailor, Quebec, July 25.

Curators appointed.

Re R. P. Dinahan.—Bilodeau & Renaud, Montreal, joint curator, July 25.

Re John G. LeBlanc, trader, Carleton.—H. A. Bédard, Quebec, curator, July 25.

Re John LeBoutillier & Co., Gaspé Basin.—N. Matte, Quebec, and C. S. LeBoutillier, Gaspé, joint curator, July 16.

Dividends.

Re Philéas Faucher, St. François Xavier de Brompton.—Second and final dividend, payable Aug. 19, J. A. Begin, Windsor Mills, curator.

Re Tancred Robitaille, St. Hyacinthe.—First and final dividend, payable Aug. 20, J. Morin, St. Hyacinthe, curator.

Minutes of notaries transferred.

Minutes of Charles Robert, N.P., Ste. Pudentienne, transferred to Joseph Gingras, N.P., Ste. Claire, county of Dorchester.

Minutes of late G. M. Prévost, N.P., and François de Salles Prévost, N.P., Terrebonne, to be transferred to E. S. Mathieu, N.P., Terrebonne.

Minutes of late J. T. Langlois, N.P., Sutton, to F. L. Mongeon, N.P., township of Sutton.

¹ Tome I, p. 279.

² Kent, Vol. III, note to [375], says that in France valued policies are rejected. This is not the case, but they do not estop the insurers.

The Legal News.

VOL. XIII. AUGUST 9, 1890. No. 32.

SUPREME COURT OF CANADA.

OTTAWA, June 12, 1890.

Nova Scotia.]

O'BRIEN V. COGSWELL.

Assessments and taxes—Assessment Act—Lien—Priority of—Mortgage made before Statute—Construction of Act—Healing clause—Effect and application of.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon except as against the Crown.

Held, affirming the judgment of the Court below (21 N. S. Rep. 155, 279) that such lien attached on a lot assessed under the Act in preference to a mortgage made before the Act was passed.

The Act provided that in case of non-payment of taxes assessed upon any lands thereunder, the City Collector should submit to the Mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the Mayor should affix his signature and the seal of the Corporation; one of such statements should then be filed with the City Clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on the real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, &c. In a suit to foreclosure a mortgage on land which had been sold for taxes under this Act the legality of the assessment and sale was attacked.

Held, per Strong, Taschereau and Gwynne, JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section, it was necessary for the defendants to show, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the Act; and the production and proof of one of such statements was not sufficient.

Per Ritchie, C. J., and Patterson, J., that it was sufficient to produce the statement returned to the collector signed and sealed as required, and with the necessary warrant annexed, and in the absence of evidence to the contrary it must be assumed that all the proceedings were regular and that the provision of the statute had been complied with.

The Act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.

Held, per Strong, Taschereau and Gwynne, JJ., that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale, and would not cover the failure to give notice of assessment required before the taxes could be enforced.

Held, per Ritchie, C. J., and Patterson, J., that the deed could not be invoked in the present case to cure any defects in the proceedings, as it was not delivered to the purchaser until after the suit commenced; therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the Act, rendered the sale void.

Appeal dismissed with costs.

Sedgewick, Q. C., and Lyons for appellant.
Lash, Q. C., and McDonald for respondents.

OTTAWA, June 13, 1890.

Nova Scotia.]

LAWRENCE V. ANDERSON.

Debtor and Creditor—Assignment in trust—Release to debtor by—Authority to sign—Ratification—Estoppel.

L. brought an action against A., on an account stated, to which the defence set up was release by deed. On the trial it was shown that A. had executed a deed of assignment in trust for the benefit of his creditors, and under authority by telegram had signed the same in the name of L. After the execution of the deed by A. the creditor, L., continued, with knowledge of the deed, to send him goods, and about a month after he wrote A. as follows:—"I have done as you

"desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for \$800." Four years after, A. wrote to L. a letter in which he said: "In one year more I will try again for myself and hope to pay you in full." The account sued upon was stated some eighteen months after this last letter.

Held, reversing the judgment. of the Court below, Taschereau and Patterson, JJ., dissenting, that L. was not estopped from denying that he executed the deed of assignment; and as it was evident that he did not expect to participate in the benefit of the deed, but looked to the debtor A. for payment, he could recover on the account stated.

Held, per Patterson, J., that although A. had no sufficient authority to sign the deed for L., yet there was an agreement to compound the debt dehors the deed which was binding on L., and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A.

Appeal allowed with costs.

Eaton, Q. C., for the appellant.

Newcombe for the respondent.

OTTAWA, June 13, 1890.

Nova Scotia.]

CLARK V. CLARK.

Will—Construction of—Devise to two persons—Joint tenants or tenants in common—Severance.

The will of R. C. devised his real estate to his two sons, their heirs, executors and assigns, and ordered that said sons should jointly and in equal shares pay the testator's debts and the legacies granted by the will. There were six legacies given to two other sons of the testator of \$50 each, payable by the devisees in two, three, four, five, six and seven years respectively. The estate vested in the devisees before the passing of the act abolishing joint tenancies in Nova Scotia.

Held, reversing the decision of the Court below (21 N.S. Rep. 378), Taschereau and Gwynne, JJ., dissenting, that the provisions

for payment of debts and legacies indicated an intention on the part of the testator to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. *Fisher v. Anderson* (4 Can. S. C. R. 406) followed.

On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised, evidence of a conversation between the original devisees as to the manner in which they regarded their tenure of the estate was tendered and rejected.

Held, Gwynne, J., dissenting, that such evidence was properly rejected.

Held, per Gwynne, J., that the evidence could not have had the effect of assisting to explain the will, which was the ground upon which it was rejected at the trial, but it should have been received as evidence of a severance between the devisees themselves holding as joint tenants under the will.

Appeal allowed with costs.

Harrington, Q. C., for the appellants.

Borden for the respondents.

OTTAWA, June 13, 1890.

New Brunswick.]

PROVIDENCE WASHINGTON INSURANCE CO.
v. GEROW.

Marine Insurance—Construction of Policy—Port on west coast of South America—Guano Islands—Commercial usage.

A vessel was insured for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, thence to United Kingdom. She went to Valparaiso and from there proceeded to Lobos, an island from twenty-five to forty miles off the west coast of South America, where she loaded guano and sailed for England. Having met with heavy weather she returned to Valparaiso and a survey was held by which it appeared that to repair her would cost more than she would be worth afterwards. The owner claimed payment on the policy for a constructive total loss, which was resisted on the ground of deviation in the vessel loading at a port off the coast. On the trial of an action on the policy evidence was given by

shipowners and mariners to the effect that, by the usage of the shipping trade, a loading port on the west coast of South America specified in the policy would include the Guano Islands lying off the coast. The jury found for the plaintiff.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the policy must be construed to mean what would be understood by shippers, shipowners, and underwriters, and the jury having based their verdict on evidence of what such understanding would be, their finding could not be disturbed.

Appeal dismissed with costs.

Straton for the appellants.

Weldon, Q.C., for the respondent.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER V.

THE POLICY.

[Continued from p. 248.]

§ 151. *Effect of valuation in the United States.*

In the United States the rule that, in the absence of fraud, the valuation is conclusive on both parties, and that neither can introduce evidence to show that it differs from the amount really at risk, has been applied, says Shaw, to valued policies against fire in the case of *Harris v. Eagle Ins. Co.*¹ But this seems to be open to question. In that case 380 kegs of manufactured tobacco, worth \$9,600, were insured by the policy. The value was held fixed, so that, 157 of the kegs having been burnt, the insured was paid a proportional sum for them. But in this very case the value was disputed, though fraud was not pleaded. The tobacco had been manufactured by the plaintiff, and the insurer wanted to pay only its prime cost,² cost of manufacturing, and a reasonable allowance for plaintiff's time and the use of his money. Had the policy been a common open one Harris would have recovered as

much as he did: he only got the real value of his goods lost. True, the policy was held a valued one.

The cases of *Akin v. Mississippi M. & F. Ins. Co.* and *Hodgson v. Marine Ins. Co.* favor the valuations in valued policies. In the former case the insured had obtained insurance on barrels of flour by a valued marine policy for \$5,000. They were totally lost, and he recovered \$5,000, the insurers in vain urging that the cost of them was less, and that there had been fraud in the valuation.

Yet if a statute (as that of Wisconsin) order to the contrary, the statute cannot be derogated from; *e. g.* where a statute says, in case of total loss the values shall be those insured. This cannot by a clause of the policy be derogated from.¹

§ 152. *Valued policies in France.*

Judge Thompson says that in France almost all policies are valued.² This is true in one sense, and not in another. The things insured are valued. The Code de Commerce orders it, but all the French policies that I have seen have a special clause in them that the sum insured can never be taken as conclusive value of the things insured, but that the insured shall be bound to justify the value (which, I am inclined to think in Lower Canada, in the case of valued policies, he need not do at first:—See Civil Code, Art. 2575). Upon the point of value, even in the absence of a special clause such as that just mentioned, valued policies in France cannot conclude the insurers.³ Of course they bind the insured, who can never recover beyond the value put upon any subject insured; and so it is in England.⁴ Art. 1965 Code Napoléon, prohibits gambling, and valued policies are treated as such, where sought to be worked for gain beyond *valeur vénale*.

¹ *Reilly v. Franklin Ins. Co. of St. Louis*, 28 Am. Rep. p. 552 (A.D. 1877). The value, in case of total loss, is fixed by the statute of 1874 at the amount insured, and cannot be derogated from. So a policy clause, fixing the value to be the marketable value at the time of the loss, cannot be held a derogation from the statute, which cannot be derogated from, says the Court.

² 5 Johns R. p. 373.

³ In France valuation is good, but not if it exceed reasonable limits. *Alauzet*.

⁴ *Irving v. Richardson*, post.

¹ 5 Johns.

² As the insurance company wanted to do in Quinn's case, *ante*.

In *Holmes v. Charleston M. F. Ins. Co.*¹ a valuation was made in the application for insurance. The application was, probably, referred to in the policy, or otherwise made part of it. The valuation was held binding upon the insured, and he only received three-fourths of the value of his buildings as insured and valued. He was non-suited in an action asking for more.²

§ 153. *Stipulation that insurance may be reduced.*

The insurer may by a condition stipulate for power to reduce the insurance, and this condition is not to be treated as not written.³

§ 154. *Particular stipulations of policies.*

In any country the insurer may limit the force of a valuation by inserting in the policy a clause like the French one,—that the insured shall be bound to justify the value of anything lost, unless a statute like in Wisconsin (*ante*) prohibit.

Some policies, particularly open ones, provide that the loss shall be estimated according to "the true and actual value" of the property at the time of the loss happening. Some say "cash value;" this is what the French policies stipulate. The insurers by such policies stipulate to pay only to the extent of the market value (*valeur vénale*) of the subjects insured.

§ 155. *The true and actual value.*

What is the true and actual value of a thing insured, in other words its "*valeur vénale*"? The French writers are clear upon this. (Emerigon, vol. 1, ch. ix, and Boudousquie, Nos. 132 and 133; also Alauzet.) It is the price that it would sell for, or what a thing of like kind would sell for, in the same place, at the same time, under like circumstances. The cost of a house, or the invoice, or cost, prices of goods, may far exceed their *valeur vénale*. The contract of insurance, says Boudousquie, is not a proceeding to conserve the objects insured, but only a contract of indemnity. In the case of a house burned it would be unjust to say to the in-

surer, "re-establish the house as it was before the fire." The real loss once paid, the obligations of the insurer are extinct. Suppose it to be a perfectly old and tottering house, the insurer ought not to be made pay more than say a next-door neighbour whose operations might make it fall and be lost as a house.¹

§ 156. *Where the value has depreciated since the date of the insurance.*

The value of everything varies from time to time. If the subject insured has, before the date of the fire, undergone a depreciation, no matter from what cause, the insured cannot ask indemnity according to the value at the date of the policy. If he could do this, he might be interested in burning his property. Doubts may be stated where goods are depreciated by the effect of changes and chances in commerce, but are likely to regain the higher values that they once had. It may be said that if they had not been burnt they would have regained these values. There is nothing in this, for the insurer's contract was only to guarantee against the loss resulting from the fire. This loss is that of the goods reduced to the degree of depreciation in which they were when destroyed by the fire. The insurer is not *garant* for the difference which results from the fire happening at one time rather than at another.

It was held in *McCaig v. Quaker City Insurance Co.*² that depression in the value of steamers generally, from circumstances which may be only temporary, and which may have no reference to the original cost, etc., cannot be taken into account.³

Shaw (note to Ellis) says: "An interesting inquiry is suggested by the remarks of Jones, Ch. J., in *Laurent v. Chatham Fire Insurance Co.*, 1 Hall, 41, in regard to the measure of

¹ *Dodd v. Holmes*, 3 Nev. & M.

² 18 U. C. Q. B. Rep. 131.

³ In *Wolfe v. Howard Insurance Co.*, 3 Selden (N. Y.), where the insurance was on goods in public stores or bonded warehouse—"loss in case of fire to be estimated according to the true and actual cash value of the property at the time of the fire;" the measure of damages was held to be such value though the duties had not been paid. Note to [254] Sedgwick, Damages. What is meant by this? Surely goods in bond have less value than goods out, duty paid.

¹ 10 Metcalfe.

² The company, by statute, was authorized to insure only to three-quarters of the value of any property.

³ Journal du Palais, 861; A. D. 1871.

indemnity which the owner of a building insured under a fire policy is entitled to receive. Is this governed by the cost of the building, or the cost of erecting one precisely similar to it, or is it by the amount of money for which it would have sold immediately previous to the loss, affected as this amount must necessarily be, by the special and peculiar circumstances of the insured, and the local advantages or disadvantages of the building? Thus, suppose a new building, which cost \$5,000, to have been insured for that amount for the term of five years. Shortly after the insurance was effected, and before the building had become at all deteriorated by age or usage, suppose that on account of the decline of business in the place, or the contiguity of some nuisance, or by being rendered difficult of access through the erection of a railroad embankment near it, or the excavation of the street before it, its value became much depreciated, so that it would not have sold, together with the land on which it stood, for more than \$2,500. In case of its destruction by fire, under this state of things, what would be the measure of the insurer's liability, the sum for which the building would have sold, or \$5,000, the sum which it originally cost and which it would cost to rebuild it?" He adds: "In the case in 1 Hall, Jones, Ch. J., inclines to the latter opinion, and supports it by a clear and cogent argument, and this is probably the more correct view of the question, though it must be admitted that the argument on the other side is not entirely destitute of force." ["The argument on the other side," I consider to possess all the force.]

§ 157. Cases illustrating the subject.

In *Laurent's case* the policy ordered that in case of fire the loss or damage was to be "estimated according to the true and actual value of the property at the time the fire should happen," and Laurent did not get more than the true and actual value; the evidence against him was weak.

In *Grant v. The Aetna Insurance Co.*, the values of the three subjects (portions of a steamer) insured were debated. Although the plaintiff had proved the *valeur vénale* of these subjects respectively, the defendants

having gone into proof of the values of steamboats at the time, Judge Smith, presiding at the trial, in charging the jury, remarked that they "were to find according to the intrinsic value as proved by several of the witnesses," "that the defendants wished to have the values estimated by what the steamer itself would bring in the market, if sold suddenly for cash;" "that he (the Judge) could not accept that view, but that the values were to be estimated at the true, intrinsic, values at the time of the loss, unaffected by local circumstances, which might change." This charge was objected to by defendants, who moved for a new trial, and the judge (Badgley) before whom the motion was argued, said "the money value in the existing market is the only rule and guide to carry out the stipulations of the contract:" "this policy having expressly stipulated for the kind of valuation, according to the true and actual cash value of the property at the time the loss shall happen, any other instruction to the jury is not warranted, and hence the ruling and instruction at the trial were illegal."

Suppose a man erect a distillery at a cost of £1000, and to insure it from year to year, during several years, at £1000. Owing to various circumstances, particularly the spread of teetotalism in the locality, the business droops, and is finally given up; yet the insurance is continued. The building nobody would be so bold as to touch, as a distillery. It is unoccupied; the proprietor does not know what to do with it; it gets less and less worth day after day. A fire happens, and it is totally destroyed. By the policy the loss of the insured is to be "estimated by the true and actual cash value of the building at the time of the fire." This policy stipulation could not be disregarded, by substituting for the valuation it contemplated a valuation based upon alleged cost, or intrinsic value independent of all local, though perhaps temporary, circumstances. It would offend all our proper notions of public policy and morality if it were.

§ 158. Limitation of liability to case of total loss.

The insurers may stipulate to be liable only in case of total loss. In marine insur-

ance such insurances are more common than in fire. In such cases nothing must be saved. If a ship and cargo, or a house, be insured so, and only a room in the house be damaged, or the cargo only be lost or burnt, the insurers go free.

§ 159. *Constructive total loss.*

Yet though insurance be against "total loss only," in marine insurance this would comprehend constructive total loss. An absolute total loss is not, alone, within the policy; both actual and constructive total loss are comprehended.¹

In the United States and Canada, in fire insurance there is no constructive total loss, neither is the law of marine insurance, one third new for old, applicable. Whatever portion of the insured property is saved belongs to the insured, and its value is deducted from the whole value of the property, to ascertain the amount of the insurer's liability.

§ 160. *Option to rebuild.*

Generally if buildings insured be burnt, the insurer must pay. By some policies he is allowed option to rebuild. If he have stipulated for such option, and choose to rebuild, there will be nothing allowed as for difference in value of the buildings as renewed over those that were burnt. If a person insure for £500 his neighbour's building, however old, which is afterwards burned, the insured must be paid his loss not exceeding £500, unless the insurer have the option to rebuild and choose to do so. If he do rebuild he will in vain invoke the rule one-third new for old.

Sedgwick (on damages) [256] thinks the rule reasonable, and would have it to govern in fire insurance; he says that it has been admitted in Ireland (*Vance v. Foster*). It will not be admitted in Lower Canada until stipulated for by policy, which it has never yet been.

§ 161. *The average clause.*

The English offices often insert the average

¹ Per Erle C. J., *Adams v. Mackenzie*, Jan. 1863. So held also in Massachusetts, *Kettell et al. v. The Alliance Ins. Co.*, 24 Law Reporter.

clause in their policies upon farming stock; so where a person insures property collectively of larger value than the amount insured he shall only recover in the proportion which the whole value bears to the part insured. If, having property worth £1000, he insures it only for £100, in case of a fire producing loss or damage to the amount of £100 he will recover only £10. This clause is sometimes inserted in other policies.

Some companies in France make it a condition that the assured shall always be held his own insurer for one-fifth. Agnel, p. 58. The French policies generally state that where the amount of loss exceeds the insurances, the insured is to be considered his own insurer for the excess, and is to bear in that quality a proportion of the loss.

§ 162. *Written words in the policy control the printed portion.*

Written words in the policy control the printed; e. g. the written part may treat of alienation of the subject insured, or of the policy, and order things for such cases; condition printed on the back of the policy may do so too, and be more rigid, the written will control.¹

An illustration of written matter controlling printed condition is to be found in *Blake Ex. M. Ins. Co.*² The clause, "other insurance permitted without notice till required," was written. And there was the printed condition, "in case of other insurance not notified or endorsed on the policy, this insurance shall be void; or if the insured shall hereafter make other insurance, etc., not notified and endorsed, this policy shall be avoided."

In France printed clauses have the same force as written ones. It is said in some cases, however, that written ones may be presumed more easily to have been noticed.

§ 163. *Effect of by-laws upon policy.*

It is a general rule that parol evidence shall not be admitted to vary the terms of a policy. Some companies would have their by-laws held part of the policy. Generally this pretension cannot be sustained, unless

¹ See *Soupras v. The Montreal F. I. Co.*, post.

² 12 Gray's Rep.

by policy making them so, and the by-laws being annexed to the policy by printed or written copy.¹

CHAPTER VI.

THE CONDITIONS OF THE POLICY.

§ 164. *Conditions—express or tacit.*

The contract of fire insurance is a conditional one. Conditions are express, or tacit. Express conditions are by clauses in or upon the policy, or making part of it by agreement, express or implied. These have for object to suspend the obligation of the insurer, to vacate it in certain cases, as to modify it; to suspend it, as when the insurer promises to pay if such a thing be lost or damaged; to vacate it, as when the insured agrees that if he alienate the subject insured the policy shall end and the insurance cease; to modify it, as when both agree that if the insured effect other or double insurance the first insurer shall benefit, or be liable to pay only a portion of the amount insured by him.

Such conditions are positive or negative. Under the former such an event or thing must occur or be done positively; under the second an event or thing must not happen, or be done.

Tacit conditions are those that are implied and exist, although not expressed by writing in the contract. These spring from the law and the nature of the contract, or from the intention presumed of the parties; for instance, though a policy be silent on the subject, the insured is bound to make fair disclosure of all circumstances affecting the risk; he must make no misrepresentation; the insured is not, after the policy is granted, to alter a house insured making it to differ, materially, from the description of it in the policy; the insured is to be indemnified only; if, though a fire happen, he lose nothing, he shall recover nothing; if the insured wilfully set fire to the subject insured he shall recover nothing.

The conditions of the policy involve the mutual stipulations of both parties, and are part of one and the same express contract.²

§ 165. *In what place the conditions should be written or printed.*

Conditions to be binding ought to be

written upon the policy or on a paper annexed to it, and referred to in it as part of it. They may be collected from *proposals* for insurance where these are referred to in the policy as part of it, or by the by-laws of an insurance company if declared to be part of the policy; but whether mere annexing to the policy a paper of conditions and delivery of it will operate so is questionable.

Angell, § 14, says that a written memorandum wafered to a policy will not be held part of it, unless there be a stipulation in the policy that it shall be.

Conditions, though not expressly referred to in the policy, but being on the same sheet of paper, are to be taken *prima facie* as part of the policy.¹ In the case of *Roberts v. Chenango M. A. Co.*, it was held that conditions contained in a paper annexed to a policy and delivered with it ought *prima facie* to be considered part of the policy; but in *Bize v. Fletcher*,² Lord Mansfield would not allow that a mere slip of paper wafered to a policy and describing the subject insured, or containing other statements, could involve warranties, as conditions might, but that it could stand at most a representation.

Before the passing of Revised Statutes, Ontario, c. 162, insurance companies in that province could endorse any conditions upon their policies, whether hard or unreasonable, or the contrary. But now in Ontario, by statute (cap. 162) conditions have to be printed on policies in a particular way. The question often is: has the statute been complied with so as to bind the assured to observance of condition?³

Statutory conditions are imposed; and variations and additions the Court, or judge, at the trial, may hold to be reasonable, or unreasonable, (p. 72, *Ib.*) and so says the statute. And these variations and additions must be in conspicuous type and of different color.⁴

¹ 3 Hill's R. 561. Flanders seems to approve: See p. 236.

² 1 Doug.

³ *Bullagh v. Royal Mut. F. Ins. Co.*, Q. B. Rep., Vol. 44 of 1879.

⁴ The Insurance Company cannot resort to special, their own conditions avoiding the policy for non-disclosure of a previous insurance, these not printed as "variations," in the mode prescribed by R. S. Ont. ch. 162: nor can the Company resort to the statutory conditions, they not being printed on the policy; *Parsons v. Citizens Ins. Co.*, 4 Ont. App. Rep. The first verdict was for plaintiff, the insured. The Q. B., 2dly, confirmed that, maintaining plaintiff in his verdict. On appeal, the appeal was dismissed in the Ontario Court of Appeals, 1879, and this was affirmed by the Supreme Court of Canada.

¹ *Taylor v. Aetna Ins. Co.*, 13 Gray's R.

² 1 Phillips (Ed. of 1854) No. 63.

Revised Statutes Ontario, c. 162, interim receipt. Plaintiff insured subject to all the company's covenants and conditions.

No conditions were printed on the interim receipt. The Company after being sued was held not to have right to go to their special conditions, nor to the statutory.

The Ont. Q. B. judgment was affirmed so by Court of Appeals, 1879. And this was confirmed in Supreme Court afterwards; but the judgment was reversed by the Privy Council.

The Ontario Act was meant to secure uniform conditions in policies.

The statutory conditions have to be printed; if not, "variations" in the conditions cannot be allowed.

The insured may repudiate any special conditions unless made with reference to the printed statutory conditions, but the insured can invoke even the unprinted statutory and withstand variation or alteration of them against his will.

The courts have the power now in Ontario under a recent statute to declare that a condition is not reasonable, and to annul it; per Burton, J., in appeal in 1879 in *Parsons v. Standard Ins. Co.*, 4, Ont. appeal R.¹

In Massachusetts, there is a statute in force, passed in 1861, which orders: "In all insurance against loss by fire hereafter made, the conditions of the insurance shall be stated in the body of the policy; and neither the application of the insured nor the by-laws of the insurance company, as such, shall be considered as a warranty or

¹ In *Parsons v. The Standard Ins. Co.*, the plaintiff got a verdict. In the Q. B. that verdict was refused to be set aside. Then the Court of Appeal in 1879 set it aside; then the Supreme Court re-established the Q. B. judgment. The applicant was asked: What other insurances and in what office? He answered, four, and named the four companies, but entitled one of them as the Canada Fire & Marine Co., whereas the true name of the company he had insured in was "the Provincial." The true amount of all the insurances being given, unintentional error in the name was held by the Q. B. and Supreme Court not fatal. One of the above four policies having expired, the insured substituted for it another of like amount in a different company (the total insurances not increased). The policy was not avoided, and communication of this new policy was held not requisite. (Yet a condition was that prior or subsequent insurances not communicated were to avoid the policy.)

part of the contract."¹ Yet reference may be made to the application in the conditions stated in the policy. But a mere evasion of the statute cannot be allowed, or an attempt to make them as such part of the contract. The substantial correctness of a statement in the application of the insured may be by condition promised, or stated, by the assured; as that the value and situation of the property are stated truly in the application. If there be material misrepresentations in the application, the insurance company may resist payment.

A slip, entitled "conditions of insurance," being on half a sheet of paper, and the policy on the other half, both were held to be taken together, though no express reference was made in the policy.²

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 9.

Judicial Abandonments.

Alexandre Chaput, hardware merchant, Montreal, July 22.

Moise Clairoux, trader, Hull, Aug. 4.

William Grant, trader, Chisoutimi, July 29.

Jean Lemelin, grocer, Quebec, Aug. 1.

W. & G. H. Tate, manufacturers and ship-builders, Montreal, July 24.

Curators appointed.

Re William H. Arnton, Montreal.—W. A. Caldwell, Montreal, curator, Aug. 5.

Re Alexandre Chaput.—E. Tougas, Montreal, curator, July 29.

Re Pierre Ernest Fugère.—Bilodeau & Renaud, Montreal, joint curator, Aug. 5.

Re George Lapointe, contractor.—T. Gauthier, Montreal, curator, Aug. 5.

Re Bernard Sauvage, St. Johns.—A. Turcotte, Montreal, curator, Aug. 4.

Dividends.

Re Placide Daoust, grocer, Montreal.—First and final dividend, payable Aug. 23, T. Gauthier, Montreal, curator.

Re Jos. L. Gravel.—First and final dividend, payable Aug. 27, C. Desmarceau, Montreal, curator.

Re John Walker, Grenville.—First dividend, payable Aug. 27, A. Pridham, Grenville, curator.

Separation as to Property.

Valérie Lemaire vs. Téléphore Bousquet, farmer, St. Césaire, July 23.

¹ *Barré Boot Co. v. Milford M. F. Ins. Co.*, 7 Allen's Rep. (A.D. 1863).

² *Roberts v. Chenango Co. Mut. Ins. Co.*, 3 Hill, 501. See further post.

The Legal News.

VOL. XIII. AUGUST 16, 1890. No. 33.

An Indian criminal prosecution which has excited some attention, the trial of the mahunt of Tripati, who was prosecuted for stealing the treasure of the temple of which he was the head, and convicted and sentenced to three years' imprisonment, has brought to notice the fact that some of his counsel withdrew from the case because their fees were not paid. The Chief Justice of the Madras High Court to which the case had been appealed, adverted to this circumstance in severe terms, remarking that while such a course could be justified in civil cases, it could not be defended in criminal matters, and he added that he would deal with a barrister guilty of such an act as he deserved, whatever might be the practice of the local bar. The *American Law Review*, noticing this case, says:—"We had always understood that the reason why a surgeon cannot receive a patent of nobility in England is that he *takes pay directly* for his services, the custom of the patient being to leave a guinea on the mantel-piece for him to pick up when he goes out, and the 'high-falutin' theory being that he who touches lucre for professional or humane work can never be ennobled. Whereas the barrister does not touch the lucre; it never comes to him in the way of contract; he cannot sue for it; it is in some gentle way slipped into his coat-tail pocket, just as the tip is slipped into the hand of the bowing and over-complimentary hotel waiter. In America, we have, for the most part, done away with this antiquated nonsense, and the rendition of professional services stands on the footing of the rendition of mere work and labor, or any other species of valuable services. It is a matter of contract, and it is no dishonor to take money directly for it."

A curious example of the right of a corporation to be protected in the use of its name occurred recently. The celebrated wax

works museum of Madam Tussaud is now conducted by a company styled "Madam Tussaud & Sons, Limited." There happened to be an individual named Louis Tussaud, and he or his associates conceived the idea of registering a new company under the name of "Louis Tussaud, Limited." The original company applied for an injunction to restrain the registrar of joint-stock companies from registering the new company. The case came before Mr. Justice Stirling, who held that although Louis Tussaud might open and carry on the wax work business in his own name, and might take in partners and trade under the name of "Louis Tussaud & Co., yet he could not confer on another person or company the right to use the name of Tussaud in connection with a business which he had never carried on, and in which he had no interest. The learned judge reasoned that, presumably, the object of the defendant and his proposed company was to induce the world to believe that the business to be carried on was that of the plaintiff company, or a branch of it; and he accordingly granted the injunction prayed for.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, June 25, 1890.

PRESENT:—THE LORD CHANCELLOR, LORD BRAMWELL, SIR BARNES PEACOCK, SIR RICHARD COUCH.

LA BANQUERD'HOCHELAGA et al. v. MURRAY et al.

Letters patent—Obtained by fraud—Art. 1034, C.C.P.

Held:—1. *Where the names of persons were inserted in the petition for letters patent without their consent or authority, and the declaration verifying the petition was false, that such letters patent were obtained by means of a fraudulent suggestion, and may be annulled by the Superior Court, as provided by Art. 1034, et seq. C.C.P.*

2. *Where letters patent incorporating a joint stock company are annulled as having been obtained by fraudulent suggestion, that they cannot be partially annulled as to some of the persons incorporated, but must be entirely annulled.*

3. *Where the prayer of the information was to the effect that the letters patent might be annulled at least in so far as the parties complaining thereof were concerned, that the Court may entirely annul the said letters patent.*

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

This is an appeal from judgments of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), reversing judgments of the Superior Court for Lower Canada, Province of Quebec, district of Montreal.

In May, 1883, the appellants, La Banque d'Hochelaga, obtained in the Superior Court a judgment against the Pioneer Beetroot Sugar Company, Limited, for \$40,800.80, with interest and costs, and on or about the 30th May, 1883, the said appellants, under the provisions of the Quebec Statute, 31 Vict., c. 25, issued a writ of execution upon the said judgment, to which, on 25th June, 1883, the sheriff made a return of *nulla bona*.

In the month of June in the same year several actions were commenced by the appellant Bank, as creditors of the said Company in respect of the said unsatisfied judgment against the defendants respectively as shareholders of the said Company, to recover from them respectively the amounts remaining unpaid upon the shares alleged to be held by them respectively in the above-mentioned Company; and the question in each of the said actions was, whether or not the said defendants were liable as shareholders in the said Company.

In the case of the defendant William G. Murray, he denied that he had ever promoted or been party to the incorporation of the said Company, or connected therewith in any way, and alleged that if his name had been used it had been used without his authority and by fraud. He denied that he had ever been treated as a shareholder or member of the Company, or had ever been entered as a shareholder in the books of the Company.

On the 27th July, 1883, the said Company was ordered to be wound up, and John Fair

was duly appointed liquidator. He afterwards obtained leave to intervene, in order that any amount recovered in the said action might be paid into the hands of the said liquidator, to be distributed, according to law, amongst the creditors of the Company; and in September, 1884, the appellant Thomas Darling was substituted for the said John Fair as intervener in the said cause.

It was enacted by the above-mentioned Statute, 31 Vict., c. 25, Section 1, Clause 6, that the expression "shareholder" or "stockholder" means every subscriber to or holder of stock in the Company, and extends to and includes the personal representatives of the shareholder.

By Section 2 it was enacted that the Lieutenant Governor in Council may by letters patent under the Great Seal grant a charter to any number of persons, not less than five, who shall petition therefor, constituting such persons and others who may become shareholders in the Company thereby created a body corporate and politic for certain purposes therein mentioned, of which the purpose of the said Beetroot Sugar Company was one.

The Company was incorporated by letters patent, issued under the Great Seal of the Province of Quebec, in pursuance of the provisions of the said Act. The letters patent were issued upon a petition presented to His Honour the Lieutenant Governor of Quebec in the names of Gerhard Lomer, the defendant William G. Murray, the other defendants, and other persons, stating that they had associated themselves together for the purpose of establishing a Joint Stock Company for the manufacture of sugar from beetroot in the said Province, and that they were desirous of obtaining a charter by letters patent under the Great Seal of the Province, to constitute themselves and their successors and such other persons as had or might become shareholders a body corporate and politic, that each of them had taken and subscribed the amount of stock set forth therein, and praying that His Honour would be pleased to grant a charter of incorporation to them by letters patent, to be issued under the Great Seal of the Province, constituting them and their successors, and such other

persons as had or might become shareholders, a body politic and corporate by the name of the "Pioneer Beetroot Sugar Company, limited," for the purpose and with the capital stock therein mentioned.

The petition was verified by the solemn affirmation of the said Gerhard Lomer, in which he declared that to his knowledge the allegations and averments of the said petition were true, and it was accordingly recited in the letters patent that the said Gerhard Lomer, the defendants, and the said other persons had by petition represented that they were desirous to be incorporated by the name of the Pioneer Beetroot Sugar Company, and that the truth and sufficiency of the facts stated in the said petition had been established to the satisfaction of Her Majesty.

It was enacted by Section 51 of the said Act that, save only in any proceeding by *scire facias* or otherwise for direct impeachment thereof, the letters patent or supplementary letters patent themselves or any exemplification or copy thereof under the Great Seal should be conclusive proof of every matter and thing therein set forth.

Parol evidence was given in the actions on the part of the defendants, but the whole of that evidence was objected to, and a motion was made by the Bank that all parol evidence adduced by the defendants to contradict their subscription in writing to the capital stock of the said Company, or to contradict the said letters patent or anything mentioned therein, should be declared illegal and be rejected.

In December, 1884, the defendants instituted proceedings for improbation of the said letters patent under Article 154 and following Articles of the Code of Civil Procedure for Lower Canada, with the object of having their names struck out of the said letters patent. That application was dismissed by the Superior Court, and the judgment having been in this respect affirmed by the Court of Queen's Bench, from which there has been no appeal, it is not necessary to consider it further.

In December, 1884, the Honourable L. O. Taillon, as Attorney General of the Province of Quebec, filed an information against the

said Company and the appellant Thomas Darling as liquidator thereof and the Bank as *mise en cause*, whereby after alleging, amongst other things, that the above-mentioned letters patent had been obtained by fraudulently suggesting that the defendants and others had petitioned for the grant of the same, and were desirous that the same should be granted, and alleging that the defendants had represented that they could not adequately defend themselves without the benefit of a *scire facias*, he prayed that a writ of *scire facias* should issue and be made known to the said Company, and to the said Thomas Darling in his quality of liquidator of the said Company, and to the said La Banque d'Hochelaga, ordering them and each of them to appear and show anything which they or either or any of them might have or know why the said letters patent should not be declared fraudulent, null, and void, at least in so far as the said defendants were concerned; and further that the Court being more surely informed of all the premises should then declare by the judgment to be rendered on the said information that the said letters patent were fraudulent, null, and void, at least in so far as the said defendants were concerned.

A writ of *scire facias* was issued according to the terms of the information.

Thereupon the Company, declaring that they severed in their pleading from the *mise en cause*, demurred to the said information, because, amongst other reasons, the remedy sought to be invoked by the informant, to wit, the process of *scire facias*, cannot be applied except to set aside the letters patent themselves, which was not sought to be done in the present case.

The Company also, without waiver of their demurrer, pleaded to the said information, and, amongst other things, alleged that it was specially false that the persons at whose request the said information was issued, that is to say, the defendants in the said actions, never participated in the application for the issue of the letters patent in question, nor ever subscribed for stock in the said Company, and that, on the contrary, they and each of them did subscribe unconditionally to the capital stock thereof, and did either

themselves or by their duly authorized agent petition for the issue of the said letters patent, and that the same were issued on the faith of the original unconditional subscription of the said persons, which had been transmitted and communicated to the Provincial Secretary or other proper Governmental officer; that the said letters patent were issued on the 15th of July, 1880, and were published according to law, and that the fact that the same were issued to the corporators mentioned therein was published in the leading daily newspapers then in the city of Montreal, which newspapers were at the time subscribed to or read by the said corporators and each of them; that the persons at whose instance the information was laid were persons of large reputed means, and that the fact of their being known and published as corporators in the said Company contributed largely to the financial standing of the said Company, and was thus an inducement to capitalists to make advances to the said Company.

The action of La Banque against the defendant William G. Murray, together with the intervention of the said Thomas Darling and the information for the writ of *scire facias*, together with the proceedings in impropriation and the motion to reject the evidence above mentioned, were heard in the Superior Court, before the Honourable Mr. Justice Loranger, and in or about June, 1886, the learned Judge gave judgment in the said action, granting the motion for the rejection of evidence, and dismissing the application for annulling the letters patent, and ordering the defendant William G. Murray to pay the amount claimed from him into the hands of the intervener, the liquidator of the said Company, to be distributed according to law. Similar judgments were delivered in the Superior Court in the other actions.¹

In March, 1887, the Honourable Honoré Mercier, Attorney General for the Province of Quebec, was by order of the Court of Queen's Bench, substituted for the Honourable Louis Taillon.

The defendants and the Attorney General

respectively appealed against the said judgments, and the cases, having been consolidated by the order of the Court of Queen's Bench, were heard in March, 1888, before the Honourable Sir Antoine Aimé Dorion, Knight, Chief Justice, and the Honourable Justices Tessier, Cross, and Church.

The said Court (*dissentiente* Tessier, J.) on the 19th May, 1888, gave judgment reversing the judgment of the Superior Court on the information for the *scire facias*, and it was ordered that the letters patent should be repealed, cancelled, and annulled in so far as the defendants were concerned, and that the names of the defendants should be struck out of the said letters patent; and the actions of the appellant Bank against the defendants were dismissed.

It has been agreed for the purpose of this appeal that the declarations, pleadings, evidence, and judgments in the consolidated cases are the same, *mutatis mutandis*.

Their Lordships concur with the majority of the Judges of the Court of Queen's Bench in their findings of fact, as stated in their reasons. From these it appears that the defendants were never organized as shareholders, and that no allotment of stock was ever made to them; that they had proposed the formation of a Joint Stock Company, which, however, was only to be put into operation on certain conditions, and especially that of obtaining a Government subsidy, without which it was distinctly understood that the Company should not be formed; that the conditions not being fulfilled, they abandoned the project, and their names were never entered in the list of shareholders; that the Bank did not lend money on their names, and was, therefore, in no respect led astray by the fact that their names were used without their permission; and furthermore, that the promoters acquiesced in the withdrawal of the defendants, and at a later period formally approved thereof, and that from the time of their severance from the project the defendants ceased to be considered or even reputed to be subscribers to the undertaking; that they were never notified of any further proceedings, nor were they ever required to pay any call; that they took no part in any further

¹ See *Banque d'Hochelaga v. Garth*, M.L.R., 2 S.C. 201-218.

proceedings, and that their names were never entered in the stock ledger, nor in any book purporting to be kept in conformity with Section 32 of the Statute of Quebec, 31 Vict., cap. 25.

Their Lordships are of opinion that the names of the defendants were fraudulently inserted in the petition for the letters patent without their sanction or authority, and that the solemn declaration of Gerhard Lomer verifying that petition was false. There was therefore no ground for making them liable except the statements in the letters patent.

By Article 1034 of the Code of Civil Procedure for the Province of Quebec, it is declared that any letters patent granted by the Crown may be declared null and be repealed by the Superior Court:—(1) where such letters patent were obtained by means of some fraudulent suggestion, or (2) where they have been granted by mistake or in ignorance of some material fact.

By Article 1035, all demands for annulling letters patent may be made by suits in the ordinary form or by *scire facias* upon information brought by Her Majesty's Attorney General or Solicitor General, or other officer duly authorized for that purpose.

By Article 1036 the information is served upon the person who holds or relies upon such letters patent, and is heard, tried, and determined in the same manner as ordinary suits; and by Article 1037 an appeal lies from the final judgment rendered upon the information.

The Court of Queen's Bench annulled the letters patent only so far as the defendants were concerned, but their Lordships are of opinion that the Code does not in such a case as the present authorize a partial annulment of letters patent. To annul the letters patent as to some only of the members of the corporate body in the present case would be to alter the constitution of the Corporation created thereby. If it could be annulled as to eight or ten of the shareholders, it might be annulled as to all but five, and thus the amount of the capital of the Corporation as intended by Her Majesty to be constituted might be and would be materially diminished. In fact, by such a partial annulment, a Corporation might be created quite

contrary to Her Majesty's intention, and such a one as would be incapable of carrying into effect the objects intended by the letters patent.

The facts found show that the grant of the letters patent and the recitals therein were obtained by means of a false and fraudulent suggestion, and are quite sufficient to warrant a total annulment of the letters patent. A material question was, however, raised by the demurrer to the information as to the construction of the prayer of the information and writ of *scire facias*. It was contended that there was no prayer to have the letters patent wholly annulled, and that the information and writ of *scire facias* merely asked for an annulment so far as the defendants were concerned. Their Lordships cannot put such a construction upon the words of the prayer. The information does not merely ask to have the letters patent declared fraudulent and void so far as the defendants are concerned, but to have them declared fraudulent and void, at least in so far as the defendants are concerned. The words "at least" make a great difference in the meaning. Their Lordships' construction of the prayer is this, that the Court should declare that the letters patent were fraudulent and void, but that if the Court should think fit to declare anything less, the least that should be declared should be that the letters patent were fraudulent and void in so far as the defendants were concerned.

It would be a great miscarriage of justice if the defendants should be held conclusively bound by a false recital in the name of Her Majesty in the letters patent obtained by means of a false and fraudulent suggestion, verified by a false affidavit, and should be compelled to pay the unpaid amount of shares for which they were never subscribers, and of which they were never the holders. Her Majesty has the right, under Articles 1034 and 1035 of the Code of Civil Procedure of Lower Canada, to demand, by Her Attorney General, the annulment and repeal of letters patent obtained by means of any fraudulent suggestion. Her Majesty's Attorney General for the Province of Quebec, acting on behalf of Her Majesty, has by a recital in the information declared it to be

his duty to protect the defendants against the unauthorized and fraudulent incorporation of them in the letters patent, and against the fraudulent and mistaken issue of the said letters patent, purporting to incorporate them with others as shareholders in the said Pioneer Beetroot Sugar Company, and he has, in the opinion of their Lordships, prayed on behalf of Her Majesty to have the letters patent declared fraudulent, null, and void. Their Lordships having decided that the letters patent cannot be partially annulled, are bound to advise Her Majesty to order that they be entirely annulled, and to amend the judgment of the Court of Queen's Bench, on the information for the writ of *scire facias*, in accordance with that view.

The letters patent being annulled, there is an end of the actions at the suit of the Bank and of the interveners against the defendants as shareholders in the incorporated Company. They are not liable to be sued as shareholders of the Company in consequence of the return of *nulla bona* by the Sheriff to the writ of execution issued upon the judgment recovered by the Bank against the Company as incorporated by the letters patent.

Their Lordships will humbly advise Her Majesty to amend the judgment of the Court of Queen's Bench on the information for the writ of *scire facias*, by ordering the letters patent to be entirely repealed, cancelled, and annulled, instead of ordering them to be partially annulled and repealed as therein specified, and to order the said judgment to be affirmed in all other respects.

Also to affirm the judgment of the Court of Queen's Bench in the several consolidated actions, including those portions of the said judgment which relate to the interventions, and the interveners.

The appellants must pay the costs of this appeal.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 256.]

§ 166. Particular conditions.

The following is a condition often inserted in policies:—

"1. Applications for insurance must be in writing, and specify the construction and

" materials of the building to be insured, or
 " containing the property to be insured; by
 " whom occupied, whether as a private dwelling or how otherwise, its situation with respect to contiguous buildings, and their construction and materials; and whether any
 " manufactory is carried on within or about it; and in relation to the assurance of goods
 " and merchandize, the application must state whether or not they are of the description denominated hazardous, extra-hazardous, or included in the memorandum of special rates. If any person assuring
 " any building or goods in this office shall make any material misrepresentation or concealment; or if, after assurance is effected, either by the original policy or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured; or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of assuring, such assurance shall be void and of no effect. If, during the assurance, the risk be increased by the erection of buildings, or by the use or occupation of neighbouring premises or otherwise; or if for any other cause, the Company shall so elect, it shall be optional with the Company to terminate the assurance after notice given to the assured, or his representative, of their intention to do so; in which case the Company shall refund a rateable proportion of the premium."

In addition to the above condition the policy, in the body of it, generally contains this clause:

"In case the above described premises shall at any time during the continuance of this assurance be appropriated, applied or used, to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous, or extra-hazardous, or specified in the memorandum of special rates in the conditions annexed to this policy, or for the purpose of storing, using or vending therein any of the goods, articles or merchandize, in the conditions aforesaid denominated hazardous, extra-hazardous, or included in the memorandum of special rates, unless here-

"in otherwise specially provided for, or hereafter agreed by this Company in writing, or added to, or endorsed on this Policy, then, and so long as the same be so appropriated or used, these presents shall cease and be of no effect."

Under these two clauses I will treat of misdescriptions and misrepresentations; of concealment; of the changing the appropriation or use of buildings, to the increase of the risk of fire; and of the storing, using or vending of goods in buildings hazardingly.

§ 167. *Whole policy avoided by false swearing as to one item.*

Where three things are insured for several amounts by one policy with the above condition, *semble*, if there be false swearing as to one item, the whole policy is avoided. In the absence of the above condition, express, what would be the effect of an over-valuation in the statement? It would be presumed not fraudulent, and could not hurt, *semble*, under the system of the insured never recovering beyond the real loss proved. But under the above condition a real loss, proved, would not save. The clause in *pænd* under the condition, would be held as in England and the United States. But see *Dill's case ante*.

In *Gore Dist. M. F. Ins. Co. v. Lamo*,¹ insurance on building and stock was held entire and indivisible. In this case building and stock were insured separately though by one policy. The consideration was one sum, and the stipulation was that the policy was to be avoided, &c.²

In *Moore v. Virginia F. & M. Ins. Co.*, 26 Am. Rep., several subjects were insured, \$2,000 on buildings, \$1,000 on machinery, \$2,000 on stock of grain. A fire happened. The statement of loss was false as to stock of grain; the entire policy was held forfeited. So the policy read all claim under the policy was to be forfeited in case of any fraud or false swearing. So *Platte v. Minnesota Farmers' Mut. F. Ins. Association*, 23 Am. Rep.; consideration single; a gross sum insured; contract held entire; but in *N. Y. 29 Am. Rep. Merrill v. Agric. Ins. Co.*, the loss was held severable.

Ellis says that when a person demands twice as much in respect of his loss as he can give probable evidence of, or a jury will give him, it strongly indicates fraud.¹ *Dill's case* is not against this. He did not ask twice as much. Had he done so he probably would have met a different judgment.

In the absence of condition, exaggeration of claim, apparently, is not fatal. The existence of a condition is necessary to operate fatality. In the absence of it, why should the insured not get his real loss?

Demand wilfully exaggerated may by conditions be made to avoid the policy. 4 F. & F. Also in France, Nancy, 23 June, 1849.

In *Britton v. Royal Ins. Co.*,² there was insurance on stock and furniture for £550. Arson and fraud were pleaded. The judge (Willes, J.), advised the jury to confine themselves to the question of fraud. The jury found the claim made after the fire wilfully false and fraudulent. The plaintiff alleged loss of over £700. The plaintiff had assumed the name of Britton, having formerly used the name of Bitton; he had previously twice been burnt out, and on both occasions was insured. The plaintiff was not allowed to recover at all.

§ 168. *Concealment.*

Insurance is a contract upon speculation; the special facts upon which the risk is to be computed lie commonly in the knowledge of the insured only. The insurer trusts to his statement, and proceeds upon confidence that he does not keep back any circumstances within his knowledge to mislead into a belief that the circumstances do not exist, and to induce the insurer to estimate the risk as if they did not exist. The keeping back such circumstances is a fraud. Although the suppression should happen by mistake, without fraud, yet still the insurer is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

The law in France agrees with that of England that a concealment or suppression of a material fact, though unintentional, suffices

¹ 2 Supreme Court, Rep. (Canada).

² *Hopkins v. Prescott*, 4 C. B. Rep. is cited.

¹ See Kent's observation, *ante*.

² 4 Foster & Finlayson, 905.

to vitiate a policy. Whether the concealment or suppression arise from fraud, or merely from negligence or accident, the consequence is the same.¹

Immaterial things, of course, need not be stated.

The insurer, being a cautioner, is freed pretty much as sureties are who contract. Any fraudulent misrepresentation practised against them, any concealment of material facts from them, will entitle them to claim discharge from their suretyship.

A man hears that several attempts to burn his neighbour's house have been made. He must not conceal that, if he is afterwards insuring his own house.² So, of course, of his own house.

Where it was proved on the trial of an action on a fire policy, that a convict in the State's prison had, before the insurance was effected, threatened, in the presence of the insured, to burn the house of the latter, as soon as he should be released, the Court charged the jury, that if they considered the risk of fire thereby increased, the omission of a disclosure to the insurers of the threat at the time of effecting the insurance was a material concealment, and avoided the policy.³

A full and complete disclosure is not only necessary at the time application is made for insurance, but is also required, if a material circumstance comes to the knowledge of the applicant at any time before he knows that a policy has been issued, even though his application has already been submitted, or forwarded to the insurers by letter or otherwise.

The intelligence of a material fact, obtained by a party after he has applied for insurance, must be communicated to the insurers by the earliest and most expeditious usual route of mercantile communication, but due and reasonable diligence is sufficient, and the insured need not employ an express to convey

the intelligence, unless that be the usual mode.¹

In *Royal Bank of Scotland v. Ranken* (A.D. 1844), it was held that concealment may be undue and void a suretyship, though not made with a fraudulent motive, if it be such as to lead the cautioner to view the case in a false light.² Undue concealment may consist entirely of "non-communication."³

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 18.

Judicial Abandonments.

Joseph Filion, carriage-maker, Napierville, Aug. 5.
Victor Germain and Louis Payette, hotel-keepers, Montreal, doing business as Germain & Co., Aug. 11.
Joseph H. Lauzon, merchant tailor, Montreal, Aug. 12.

Charles Anatole Théodose Leduc and Charles Florence, Montreal, doing business under the name of Leduc & Co., Aug. 11.

Edward O'Reilly, trader, Aylmer, Aug. 5.
William Rourke, grocer, Montreal, Aug. 14.
Majorique Tardif, barber, Montreal, Aug. 9.

Curators appointed.

Re A. Hubert Bernard, jun., trader, St. Jean, I.O.—H. A. Bedard, Quebec, curator, Aug. 11.
Re Dame Mary McCaffrey, township of Dundee.—W. S. MacLaren, Huntingdon, curator, Aug. 4.
Re Joseph Filion, carriage-maker, Napierville.—A. F. Gervais, St. Johns, curator, Aug. 12.
Re William Grant, trader, Chicoutimi.—H. A. Bedard, Quebec, curator, Aug. 11.
Re Adolphe Kelsen, Montreal.—J. McD. Hains, Montreal, curator, Aug. 8.
Re Appolinaire Morisy, merchant tailor, Quebec.—H. A. Bedard, Quebec, curator, Aug. 12.
Re W. & G. H. Tate, dry dock and ship yard.—G. A. Grier, Montreal, curator, Aug. 5.

Dividends.

Re William Gariépy, of Montreal, an absentee.—Dividend payable at office of sheriff, Montreal, Sept. 2.
Re Benjamin Maynard.—First and final dividend, payable Sept. 5, Kent and Turcotte, Montreal, curator.
Re John Walker, township of Grenville.—First dividend, payable Aug. 27, A. Pridham, Grenville, curator.

Separation as to Property.

Marie Malvina Gagnon vs. Ernest Lamoureux, farmer, township of Barnston, July 17.
Claudia Gareau vs. Hermas Riopelle, trader, Aug. 11.
M. Hélène Tétu vs. Charles Le Boutillier, trader, Gaspé Basin, Aug. 7.

Exchequer Court of Canada.

To sit at Court House, in City of Quebec, at 11 a.m. Sept. 2.

¹ *Watson v. Delafield*, 2 Johns. 525; *Green v. Merchants' Ins. Co.*, 10 Pick. 402.

² *Ross' Leading cases*, Vol. 3, p. 70.

³ *Railton v. Mathews*, House of Lords, A.D. 1844.

¹ 2 Alauzet, No. 494; 1 Ph. p. 214. A shopkeeper conceals that he is a *fabriquant* and using a furnace. He is really a *fabriquant*. The assurance not mentioning the furnace is null. *Cassn.* 5 Jan., 1870.

Réticences &c., entitle insurer to sue for annulment of the contract (such suits are known in France).

² *Walden v. La. Ins. Co.*, 12 La. R.

³ *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535.

The Legal News.

VOL. XIII. AUGUST 23, 1890. No. 34.

Chief Justice Coleridge, in an article entitled, "The Law in 1847 and the Law in 1889," which appeared in the *Contemporary Review* of June last, reflects with perhaps undue severity upon Baron Parke and his adherence to technicality. "The ruling power of the Courts in 1847 (he says) was Baron Parke, a man of great and wide legal learning, an admirable scholar, a kind-hearted and amiable man, and remarkable force of mind. These great qualities he devoted to heightening all the absurdities, and contracting to the very utmost the narrowness of the system of special pleading. The client was unthought of. Conceive a judge rejoicing, as I have myself heard Baron Parke rejoice, at nonsuiting a plaintiff in an undefended cause, saying, with a sort of triumphant air, that 'those who drew loose declarations brought scandal on the law'! The right was nothing, the mode of stating everything. When it was proposed to give power to amend the statement, 'Good Heavens'! exclaimed the Baron, 'think of the state of the record'!—i. e. the sacred parchment, which it was proposed to defile by erasures and alterations. He bent the whole powers of his great intellect to defeat the Act of Parliament which had allowed of equitable defences in a common law action. He laid down all but impossible conditions, and said with an air of intense satisfaction, in my hearing, 'I think we settled the new Act to-day, we shall hear no more of equitable defences'! And as Baron Parke piped, the Court of Exchequer followed, and dragged after it, with more or less reluctance, the other common law courts of Westminster Hall. Sir William Maule and Sir Cresswell Cresswell did their best to resist the current. Lord Campbell for some time struggled in vain against the idolatry of Baron Parke to which the whole of the common law at that time was devoted. 'I have aided in building up sixteen volumes of Meeson & Welsby,' said he proudly to

Charles Austin, 'and that is a great thing for any man to say.' He repeated his boast to Sir William Erle. 'It's a lucky thing,' said Sir William to him, as he told me himself, 'that there was not a seventeenth volume, for if there had been, the common law itself would have disappeared altogether, amidst the jeers and hisses of mankind.'"

De Francesco v. Barnum, in the Chancery Division of the High Court of Justice, (Aug. 4, 5) was an action brought by a teacher of stage-dancing, to enforce apprenticeship indentures made in December, 1886, between himself, two infants named Ada and Helen Maude Parnell, and their mother, who was a widow, and to obtain damages against third persons for inducing the pupils to break their engagements with him. The indentures of apprenticeship contained provisions to the following effect:—The period of the apprenticeship was seven years, and the deeds contained covenants by the plaintiff to instruct the girls "in the higher branches of the choreographic art," and to pay to the apprentices for all or any "choreographic" engagements—in London and the suburbs—for the first three years 9d. per night, and 6d. for each *matinée*, and for the remainder of the term 1s. per night and 6d. for each *matinée*, the plaintiff having the right to engage the apprentices for performances abroad, but being under the obligation during such last-mentioned class of engagements to pay 5s. per week to the apprentice and provide her with board and lodging, and there were to be other payments of 6d. per performance when the apprentices were required for 'utility' business. The deeds contained a provision that the services of the apprentices should be entirely at the plaintiff's disposal, and that the apprentices should not, during the term of seven years, enter into professional engagements without the permission in writing of the plaintiff; and it was also provided that on failure of compliance with this and other provisions of the deeds the same might be determined by the plaintiff, and the parents be liable to pay to the plaintiff £50 as liquidated damages. Barnum's agent came and engaged

the apprentices at a guinea per week each for two daily performances at his entertainment at Olympia. The plaintiff claimed against the girls an injunction to prevent their performing at Olympia or otherwise without his leave, against the mother an injunction to prevent her allowing the girls so to perform, and against all the defendants, except the infants, he alleged that they had induced or enticed the infants to break their engagement with him and leave the employment of their lawful master, and he claimed damages. Lord Justice Fry, in dismissing the action with costs, remarked that an infant could enter into a contract to be taught a profession or occupation by which he might hereafter be benefited; but where the contract contained extraordinary and unusual terms, and it was not reasonable or for the benefit of the infant, the contract was void. His lordship held that the terms of the contract in the present case were extraordinary and unfair, and not for the benefit of the minors; and he also observed that he "had a strong impression and feeling that it was not in the interest of mankind that persons should be compelled specifically to perform engagements for personal service they were unwilling to continue, and there would be danger, if specific performance were enforced, that a contract for service would be converted into a contract of slavery."

The *Law Journal* (London) protests against the use of the plural instead of the singular in such instances as the Patents Acts, the Trade Marks Act, and the Bills of Sale Act. The plural is not incorrect, but less euphonious than the singular. In Canada, in fact, we always say the Patent Act, and not the Patents Act. So, too, we say the Indian Act, the Railway Act, etc., just as we speak of the stamp office, the appeal office, the record office, etc.

COUR DE CIRCUIT—SAGUENAY.

Coram ROUTHIER, J.

FRENETTE v. BÉDARD.

Solidarité entre mandants ad litem.

JUGÉ :—*Que les clients défendus par un avocat dans une même cause, par une seule et même*

défense, sont tenus solidairement au paiement des honoraires de cet avocat.

PER CURIAM.—Les clients défendus par un avocat dans une même cause, par une seule et même défense, sont-ils tenus solidairement ?

Dalloz, Répertoire Vbo. Avocats, No. 252 dit : "dans le cas où l'avocat croirait devoir "poursuivre judiciairement le paiement de "ses honoraires, il nous semble qu'il aurait "pour obtenir ce paiement, une action *solidaire* contre les clients qui l'ont chargé de "leur défense dans une même affaire où ils "avaient le même intérêt."

Idem, Vbo., honoraires, No. 3 : "Les honoraires sont dûs *solidairement* par ceux qui "ont demandé les conseils, les travaux, les "soins pour lesquels ils sont dûs." No. 4, même chose. No. 8 : "L'avoué a une action *solidaire* contre toutes les parties qui l'ont "chargé de les défendre."

Cette doctrine de Dalloz se trouve conforme aux principes généraux du mandat, et elle se déduit logiquement des articles 1732, 1722 et 1726 de notre Code Civil.

Berriat *St. Prix* vol. 1, p. 77—Rogron, codes français expliqués, art. 2002—Carré & Chauveau, vol. 1, p. 655, question 553.

Pigeau et Domat—Répertoire du Journal du Palais Vbo. Honoraires No. 77.

F. X. Frenette, pour le demandeur.

J. S. Perrault, pour le défendeur.

(c. l.)

COUR DE MAGISTRAT.

MONTRÉAL, 16 septembre 1889.

Coram CHAMPAGNE, J. C. M.

TASSÉ v. SAVARD, & DUDEVOIR, *mis en cause.*

Saisie-gagerie par droit de suite—Loyer—Demande de paiement.

JUGÉ : *Que bien que le loyer soit quérable, lorsque le locataire quitte les lieux, sans raison et sans donner d'avis, le demandeur n'est pas obligé de faire la demande de paiement du loyer ailleurs qu'aux lieux loués.*

PER CURIAM :—Le défendeur avait loué une maison du demandeur, pour un an, au prix de \$4.50 par mois, payable mensuellement. Au mois de juillet, alors qu'il y avait un

mois d'échu et non payé, sans avis et sans raison valable, il quitta les lieux loués. Le demandeur prit alors une saisie-gagerie par droit de suite pour le loyer échu et pour celui du reste de l'année.

Le défendeur plaide qu'il ne devait payer que le mois échu, et sans frais, parce que le demandeur n'avait pas fait une demande de paiement avant l'action.

Bien que le loyer soit quérable, le demandeur n'était pas tenu de courir après le défendeur pour lui en faire la demande avant l'action. Le défendeur ayant quitté les lieux loués, sans raison et sans le consentement du demandeur, et ayant déplacé ses effets, la saisie-gagerie par droit de suite est bien fondée pour le tout.

Saisie-gagerie maintenue avec dépens.

Autorités :—C.P.C. 873; *Houle v. Godère*, 18 L. C. J. 151.

A. A. Laferrière, avocat du demandeur.

F. L. Sarrasin, avocat du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 31 octobre 1889.

Coram CHAMPAGNE, J. C. M.

ATKINSON ET AL. V. DADE.

Judicatum solvi—*Société*.

Jugé :—*Que lorsque dans un bref d'assignation un des demandeurs formant partie d'une société commerciale est décrit comme résidant en dehors de la Province de Québec, il ne sera pas tenu de donner un cautionnement pour frais.*

L'un des demandeurs formant partie de la société commerciale demanderesse faisant affaires à Montréal, était décrit comme résidant au Manitoba, dans la Puissance du Canada.

Le défendeur fit motion pour qu'il fût tenu de fournir un cautionnement pour frais, *judicatum solvi*.

PER CURIAM :—La jurisprudence sur cette question est très contradictoire. Mais devant cette Cour où les frais sont très peu élevés, il n'y a pas lieu dans une cause comme celle-ci de donner un cautionnement pour frais.

Motion renvoyée sans frais.

Autorités :—*Globe Mutual Life Ins. Co. v. Sun Mutual Life Ins. Co.*, 1 Leg. News, 139; *Howard v. Yule*, 3 Leg. News, 378; *Victoria Mutual Fire Ins. Co. v. Carpenter*, 4 Leg. News, 351; *Beaudry v. Fleck*, 20 L. C. J. 304; *The Niagara District, etc. v. MacFarlane*, 21 L. C. J. 224; *Globe Mutual Ins. Co. v. Sun Mutual Ins. Co.*, 1 Leg. News, 53.

McCormick & Duclos, avocats des demandeurs.

Sicotte & Murphy, avocats du défendeur.

(J. J. B.)

SUPERIOR COURT—MONTREAL.¹

Mari et femme—*Marchande publique*—*Responsabilité*—*Mandat*.

Jugé—Qu'un mari dont la femme, marchande publique, tient au domicile commun un commerce sous le nom du mari seul, et qui achète des marchandises pour le commerce de sa femme, mais en son nom personnel, sans que le vendeur sache que c'est pour sa femme, est responsable du montant vis-à-vis de l'acheteur.—*Adams v. Brunet*, Wurttele, J., 20 mai 1890.

Exception dilatoire—*Discussion*—*Domage*—*Responsabilité des directeurs de compagnie incorporée*—*Ratification des actionnaires*—*Action des actionnaires contre les directeurs*—*Dividendes fictifs*—*Plus-value des biens*.

Jugé—1o. Qu'un plaidoyer de discussion préalable d'un gage doit se faire par exception dilatoire indiquant les biens à discuter et accompagnée d'une somme suffisante pour parvenir à cette discussion;

2o. Qu'une personne qui a une action en dommage contre son débiteur et qui en a reçu un gage, n'est pas tenu de discuter le gage avant de prendre son action en dommage;

3o. Que l'action en dommage que les actionnaires d'une compagnie incorporée peuvent prendre contre les directeurs, pour mauvaise administration, paiement de dividendes fictifs pris à même le capital etc., ne se prescrit que par trente ans;

4o. Qu'une corporation ne peut, pour déclarer un dividende, prendre en considéra-

¹ To appear in Montreal Law Reports, 6 S.C.

tion la plus-value, ou accroissement en valeur de ses immeubles et de son matériel durant l'année, car, ce serait le mettre en danger, en l'escomptant, mais, elle peut justifier un dividende sur un fonds dit "de reconstruction" fait et accumulé à même les profits annuels, quoique ce fonds soit destiné au renouvellement du matériel;

50. Que quoique les créanciers d'une compagnie incorporée et les tiers soient recevables à se plaindre que les directeurs aient payé des dividendes fictifs en augmentant la valeur réelle des biens de la compagnie, les actionnaires qui ont assisté aux assemblées annuelles et autorisé ces dividendes après avoir pris communication des états et inventaires soumis par les directeurs, sont non recevables à prétendre que le paiement de ces dividendes les a trompés sur l'état de la compagnie; que les actionnaires qui n'ont pas assisté à ces assemblées ne sont non plus recevables, parce qu'ils pouvaient y assister et se renseigner comme les autres, et qu'ils doivent s'imputer leur négligence;

60. Que l'action qu'ont les actionnaires d'une compagnie incorporée contre les directeurs pour mauvaise administration des affaires de la corporation est une action commune résultant des rapports de mandant à mandataires; et que cette action est anéantie par la sanction de l'administration des directeurs donnée par les actionnaires.—*La Banque d'Epargne v. Geddes et al.*, Pagnuelo, J., 24 février 1890.

Acte électoral de Québec—Rentiers—Rôle d'évaluation—Preuve—Locataires—Propriétaire—Fils de propriétaire—Erreur de nom.

Jugé—10. Que la qualification des rentiers, sous la loi électoral de Québec, est personnelle, et que partant les rentiers doivent être inscrits comme électeurs sur la liste des électeurs de la municipalité où ils demeurent et non sur celle de la municipalité où sont situés les immeubles pour lesquels leurs rentes ont été constituées;

20. Que si la valeur réelle de l'immeuble loué doit être constaté uniquement par le rôle d'évaluation, les autres faits que constituent chez un locataire la qualité d'électeur peuvent être établis par une autre preuve, et

que sa qualité de locataire d'un bien-fonds entré au rôle peut être prouvée oralement ou par la production d'un écrit;

30. Que le fait qu'un locataire occupant tout un lot suffisant pour le qualifier, aurait convenu de laisser à son propriétaire certaines réserves, ne l'empêche pas d'être inscrit comme électeur;

40. Qu'une personne qui n'est pas locataire d'un immeuble, mais qui l'occupe comme le serviteur du propriétaire, n'a pas la qualité requise pour être électeur;

50. Que pour être inscrit sur plainte comme électeur, il n'est pas nécessaire que le nom d'un propriétaire soit entré sur le rôle d'évaluation, si la qualité de propriétaire est établie par la production du titre, et si la valeur voulue est établie par le rôle d'évaluation;

60. Que pour être qualifié comme électeur, un fils de propriétaire doit avoir demeuré depuis un an, avec son père ou autre ascendant possédant un immeuble suffisant en valeur, d'après le rôle d'évaluation, pour la qualification foncière des deux, mais qu'il n'est pas nécessaire qu'ils résident sur le bien-fonds, qui peut même être situé dans une municipalité autre que celle où ils demeurent;

70. Que lorsqu'un nom d'électeur est entré erronément sur la liste des électeurs, le conseil municipal ne doit pour cela le retrancher de la liste, mais il doit le corriger et l'inscrire correctement.—*Jeannotte v. La Corporation de la paroisse de Belœil*, Würtele, J., 2 juin 1890.

Capias—Affidavit—Signature du jurat.

Jugé—Que la Cour ne peut accorder au protonotaire ou à son député devant lequel un affidavit devant servir à l'émanation d'un *capias* ou d'une saisie-arrêt avant jugement est assermenté, et qui oublie de signer le *jurat*, la permission d'y apposer sa signature après l'émanation et la signification du bref.—*Dubois v. Persillier*, Würtele, J., 9 juin 1890.

Municipal powers—City of Montreal—Collection of tax—Farming out system.

Held—1. The electors and rate payers of a municipality have the right of knowing, from

the books and records of the corporation, the amount collected from each tax imposed by the council, and the details of the expenditure.

2. The salary of officers appointed by the council of the city of Montreal must be fixed; and be either a stipulated sum for a given period, or a stipulated commission or percentage on collections.

3. The farming out of a tax imposed on horse dealers, whereby the farmer pays the council a stipulated sum for a given period, and collects the tax for his own benefit, is illegal; and a resolution of council sanctioning such an arrangement will be annulled.—*Kimball, petitioner, and City of Montreal, respondent*, Württele, J., July 8, 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VI.

CONDITIONS OF THE POLICY.

[Continued from p. 284.]

Where the agent of the insured makes concealment of a material circumstance, it is held to be the same as if the principal had knowledge, and the policy may be nullified.¹

Flanders, p. 332, says that knowledge by the agent of the insurer of other insurances is knowledge of the insurer.

Suppose the risk to have been first offered to any other insurer, and declined. Ought that to be mentioned to a later insurer? Bunyon says, yes. It depends upon circumstances. Certainly it ought to be if the first insurer to whom application was made declined for reasons given, and if it appear that what passed—if stated to later insurer—might have influenced him, and led him also to decline the risk. For instance, suppose A. to have a house bounded on one side by a vacant lot, and to apply to B. for insurance. B. declines, stating that he does not like the risk; that he knows that the vacant lot is shortly going to be built upon &c. A. procures C. to insure the house, and states nothing of what passed between B.

and himself. The vacant lot is shortly afterwards entered upon by builders, a house is put up and while carpenters are finishing it, it is burnt, and the fire burns A's house. A. may be held guilty of a suppression avoiding his policy.

It might be held fraudulent concealment if a house next to A's was burnt on the 4th, and on the 5th A. insured his house without mentioning the fire of the 4th, and on the 5th A's house were burned; but it would not be so held if A's house took fire only 3 months afterwards.

An action was brought against the directors of the Phoenix Fire Office, upon a policy dated July 25, 1814, effected on a warehouse in Heligoland. The policy referred to a letter of the plaintiff of July 11, containing the instructions for the insurance. The defendants pleaded, that, before and at the time of the writing the plaintiff's letter referred to, the warehouse and merchandise intended to be insured were in imminent peril of being consumed by fire, which the plaintiff, at the time of writing the letter, well knew; that the policy was effected upon the representation contained in the letter, and that the plaintiff fraudulently, and with intent to induce the defendants to effect the policy, concealed from the defendants the fact, that the premises were in such peril, by reason of which concealment the policy was void. The cause was tried at Guildhall, in 1815. before Gibbs, C. J. It appeared that the plaintiff was possessed of two warehouses in Heligoland, one separated by only one other building from the workshop of Jasper, a boat builder, wherein a fire broke out in the evening of the 11th of July. That fire, however, was extinguished in half an hour but four persons were employed by the plaintiff to watch during the night, lest again fire should break out. The plaintiff, on the same evening, wrote the letter referred to to his agent in London, requesting him to effect the insurance for three months at 400*l.* upon the plaintiff's warehouse, (described,) as also upon the coffee in casks and bags then stored in the same, value 3500*l.* The letter left Heligoland on the same night and reached England on the 24th and the plaintiff's agent on the following day effected

¹ *Proudfoot v. Montefiore, ante.*

the policy in question. Early in the morning of the 13th, a fire again broke out in the work-shop of Jasper, and consumed the premises insured. The jury acquitted the plaintiff of any fraud or dishonest design, the fire being apparently extinguished when he ordered the insurance, but thought that the circumstance of the fire on the 11th ought to have been communicated to the defendants, who, without this information, did not engage on fair grounds, and for whom they gave their verdict. A motion was made, to set aside the verdict and have a new trial, but refused.¹

The insured has no right by tendering an increase of premium to require the insurer to confirm a contract invalid in itself; for the insurer has in such a case a right to say, that he would not have subscribed the policy upon *any terms* if he had been informed of the circumstances which were withheld from him. His intention being to undertake only for the risks that were communicated to him, if he is deceived, that is sufficient to avoid the contract.

Shaw upon Ellis says that in Louisiana it was held that if the jury considered that the vicinity of a gambling establishment to the building insured enhanced the risk, the concealment of that fact would discharge the insurers.²

Such was not held. The mere fact of the vicinity of a gambling establishment to the building insured could no more discharge insurers than could the vicinity of a grocer's shop. In this case of Lyon the insured was lessee of a big building and insured his own stock in it. He had a gambler as his tenant in the second story. Pending negotiation for the insurance the insurer stated objection to insure near gambling establishments, and plaintiff withheld information about his sub-tenant gambler; he made a concealment in fact. But, as the materiality of it was left to the jury, plaintiff recovered.

In *Westbury v. Aberdeen*,³ insurance on a ship, the jury found for plaintiff, and that a fact not communicated was not a material one. The Court granted a new trial, the

defendant paying the costs. A fact had not been observed upon by the Judge at the first trial in his charge, which fact the Court thought might have affected the Jury's finding, had it been put, viz. the fact of one ship having arrived three days before the insurance of the others.

In the United States it is not considered incumbent upon the insured, unless inquiries are made especially in regard thereto, to describe his property particularly, or represent its situation in respect to other buildings, provided there is no extraordinary circumstance in the case. In the absence of inquiries, no representation need usually be made of what materials a building is constructed, how it is situated in reference to other buildings, to what uses it is applied, or how it is heated.⁴

But if the circumstance concealed be of an extraordinary and unusual nature, the existence of which would not naturally be presumed or expected by the insurers, the strict rule as in marine insurance applies, and the concealment, if material, will avoid the policy. The consent of the insurer must not be obtained by a surprise.

In *Drury v. The Staffordshire Fire Ins. Co.*,⁵ one Thacker, a furniture maker, applied to a company for insurance, but refused to take the policy because the agent would not take the premium in furniture. Subsequently upon another application, the company refused to send down a policy, they having already sent one which had not been taken up. He afterwards insured in another company. One of the questions was, have you been refused by any other office? This question Thacker answered in the negative. Mr. Justice Stephen held that it was immaterial upon what ground the refusal was based, and Thacker was not allowed to recover.⁶

In *Goodwin v. The Lancashire F. & L. Ins. Co.*,⁷ the insurance company had many agencies. The plaintiff applied, in August, 1870, in one place for insurance upon a tannery. The application was sent to the Head

¹ *Bute v. Turner*, 6 Taunt.

² *Lyon v. Commercial In.* 2 Rob. (La.) 266.

³ 2 M. & W. 268.

⁴ *Clark v. Manufacturers' Ins. Co.*, 8 Howard, 235.

⁵ 2 M. & W. A.D. 1837.

⁶ Midland Circuit, A.D. 1880.

⁷ 16 L. C. J. (A.D. 1872).

Office, and was refused. Afterwards, on the 5th Oct., 1870, he applied to another agent in another place, and procured insurance by an interim receipt without telling the second that the first had refused. The insurance was subject to approval by the Head Office. The receipt read that the plaintiff was to be insured till notified to the contrary, and if the policy was not granted from the Head Office in thirty days there was to be no insurance. Fire and total loss occurred, 11th Oct., 1870. Fraud was pleaded against the plaintiff in and about his second application. On the 10th October, at Montreal, the Head Office repudiated the second agent's act, and told him to notify plaintiff and return the premium. This letter was mailed and postmarked at Montreal 10th October. The agent heard of the fire before the letter reached him. It was held that there had been concealment of a material fact, and that the insurance was void.

Suppose A's dwelling house insured. The company insuring him—informed that he has added buildings to his out buildings in his yard—appurtenance of the dwelling house—and considering risk increased, terminate the insurance. A does not want to remain uninsured, so he goes to another company, and they take the risk. A tells them nothing of what the former company did. Is A's insurance bad, as for non-disclosure? *seem*, no, unless there be a condition to the contrary.

The Courts in the United States have in some cases recognized a distinction between fire and marine insurance in regard to the strictness of the rule on the subject of concealment. The distinction, however, is very slight; it may just be said, as in 3 Kents' Comm., that "the strictness and nicety required in the contract of marine insurance do not so strongly apply to insurances against fire; for this risk is generally assumed upon actual examination of the subject by skillful agents on the part of the insurance offices."

Taylor, Evid., § 1277, says, where an action is brought on a policy and the question is whether facts withheld were material, can persons conversant with the business of insurance be asked their opinions on the subject? As to this there is no satisfactory

answer. It was held in a case in the Queen's Bench¹ that the evidence cannot be received; in another case the Court of Common Pleas decided that it can.²

Jeff. Insurance Co. v. Cothel,³ is like the case in the Queen's Bench. As to the case of *Chapman v. Wallon*, is it not to be held unimportant, approving as it does, *Rickards v. Murdoch*, which is overruled? Kent approves of *Rickards v. Murdoch*, Vol. 3 (note on page 284) and the decision in *Chapman v. Walton*, *McLanahan v. Universal Insurance Company*,⁴ seems to agree with Kent.

Phillips mentions the case of *Chapman*, but passes no judgment on it. He mentions the contrary cases as so many decisions.

Opinions of underwriters, whether upon certain facts being communicated to them they would or would not have insured, ought not to be received. *Durnell v. Bederly*, 1 Holt. N. P. Cas., approved *Jeff. Ins. Co. v. Cothel*, 7 Wend. But see 2 Kent, note on p. 284. In *Carter v. Boehm* (Smith L. C.) it was held that the jury ought not to pay the least regard to evidence of the insurance broker that certain letters ought to have been shown, and that if they had been, the policy would not in his opinion have been granted. [*Seem*. It is not irregular to ask the insurance agent whether more premium would have been required had certain facts been stated].

Greenleaf, Vol. 1, § 441, says, opinions of agents of insurance companies that a premium would have been higher had certain facts been communicated, are inadmissible. The case of *Campbell v. Rickards*,⁵ is cited.

The concealment must be of a fact that the insurer is presumed to trust the insured for information about. The facts, though material, if the knowledge of them be equally within the reach of both parties, need not be disclosed; for such things the insurer is not presumed to trust to the insured.⁶

In the case of *Bates v. Hewitt*, 1865,⁷ concealment by the insured of a material fact

¹ *Campbell v. Rickards*, 5 B. & Ad.; 2 Nev. & M.

² *Chapman v. Walton*, 10 Bing.

³ 7 Wend. R.

⁴ 1 Peters (per Story).

⁵ 5 B. & A.

⁶ *Alsop v. The Commercial Ins. Co.*, 1 Sumner's R.

⁷ 4 Foster & F. 1023, A.D. 1865.

known to plaintiff, unknown to defendant, was pleaded. The insurance was on "the Georgia" Confederate Steamer, but the insurance was effected without communicating this fact. She was afterwards captured by the United States. Capture was not excepted. Plaintiff replied that the defendant knew the fact. It is doubtful, where the assurer does not know a thing whether his having means of knowledge, would be enough; (if he chose to avail himself of them, or go to them).

Would the insurer go free in the following case? Suppose a furnace case; city fire police regulation to be that no furnace to be set and used in houses until certified by the fire inspector; then suppose insurance to be effected with a company whose policies state that no furnace is to be used unless such as are allowed by the city police regulations. The insured puts up a furnace, does not get it it certificated—uses it ten months—then gets it certificated. A fire afterwards occurs in the twelfth month. In this case, suppose the winter season to have passed while the furnace was used uncertificated, and summer to have come before a certificate was obtained, and fire not to have been in the furnace in the summer after the certificate obtained, and the fire to happen in summer. Again suppose a house four stories high "with city water supply on every story," (so described). Yet for eleven months no water except on the basement and first story; but in the twelfth month put all over, and in that month fire to happen; would the insurer be free? According to the Lord Chancellor in *Rees v. Berrington*—Yes.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 23.

Judicial Abandonments.

Emile Béau, Anse-aux-Gascons, county of Bonaventure, July 31.

François Bouchard, St. Félixien, Aug. 16.

Wm. Bourke, grocer, Montreal, Aug. 14.

Curators appointed.

Re Joseph Bécotte, Gentilly.—Bilodeau & Renaud, Montreal, joint curator, Aug. 18.

Re Thomas Gédéon Chenevert, St. Cuthbert.—A. Lamarche, Montreal, curator, Aug. 19.

Re Moïse Dosithé Clairoux, trader.—Wm. Grier, Montreal, curator, Aug. 15.

Re Valérie Thérien *et vir*.—A. Gauthier, Montreal, curator, Aug. 15.

Re Joseph H. Lauzon.—C. Desmarteau, Montreal, curator, Aug. 21.

Re Leduc & Co., traders, Montreal.—B. M. O. Turgeon, curator, Aug. 19.

Re John Lemelin, grocer, Quebec.—H. A. Bedard, Quebec, curator, Aug. 19.

Re Maxime Massé, jun.—C. G. H. Beaudoin, Joliette, curator, Aug. 5.

Re Edward O'Reilly, Aylmer.—J. McD. Hains, Montreal, curator, Aug. 15.

Re Germain & Payette.—C. Desmarteau, Montreal, curator, Aug. 19.

Re Majorique Tardif.—C. Desmarteau, Montreal, curator, Aug. 19.

Dividends.

Re E. N. Blais & Co., Quebec.—First dividend, payable Sept. 1, H. A. Bedard, Quebec, curator.

Re Didace Bonin, contractor.—First and final dividend (11c.), payable Sept. 8, A. M. Archambault, St. Antoine, curator.

Re Louis Depocas, Valleyfield.—First and final dividend, payable Sept. 15, Kent & Turcotte, Montreal, joint curator.

Re David Ethier.—First and final dividend, payable Sept. 1, C. Desmarteau, Montreal, curator.

Re Laurent Hébert, St. Remi.—First and final dividend, payable Sept. 15, Kent & Turcotte, Montreal, joint curator.

Re James Hoolahan.—First dividend, payable Sept. 10, Kent & Turcotte, Montreal, joint curator.

Re T. Lamy, Louisville.—First and final dividend, payable Sept. 15, Kent & Turcotte, Montreal, joint curator.

Re Ferdinand Mailhot, trader, St. Jean Deschailons.—First and final dividend, payable Sept. 1, H. A. Bedard, Quebec, curator.

Re Jacques Neveu, Ripon.—First and final dividend, payable Sept. 15, Kent & Turcotte, Montreal, joint curator.

Re Pacaud & Prévost, Sorel.—First dividend, payable Sept. 10, Kent & Turcotte, Montreal, joint curator.

Re Alexis Potvin, contractor, St. Césaire.—First and final dividend, payable Sept. 8, G. A. Gigault, St. Césaire, curator.

Re Nazaire Prévost, Sorel.—First dividend, payable Sept. 10, Kent & Turcotte, Montreal, joint curator.

Re Victor Vaohon, St. Dominique.—First and final dividend, payable Sept. 1, J. O. Dion, St. Hyacinthe, curator.

Séparation as to Property.

Flavie Domingue vs. Joseph Messier, carriage maker, township of Farnham, Aug. 19.

Angéline Gravelle vs. Jacques Neveu, trader, township of Ripon, Aug. 13.

Olivia M. Hitchcock vs. James Edson, farmer, Hatley, Aug. 16.

Notarial minutes transferred.

Minutes of late Romuald Gagnon, N.P., of St. Johns, transferred to F. X. Archambault, N.P., of the same place.

APPOINTMENTS.

Hon. J. E. Robidoux, to be Attorney-General.

Hon. C. Langelier, to be secretary and registrar.

A. Turcotte, to be prothonotary of the Superior Court, in the place of A. B. Longpré, deceased.

The Legal News.

VOL. XIII. AUGUST 30, 1890. No. 35.

Mr. Jelf, a barrister of large practice, and leader of the Oxford Circuit, writes to the *Times*, July 28, earnestly contending that trial by jury in civil causes is, generally speaking, a mistake. He would have the right to a jury trial largely restricted, and would require the party asking for a jury to show that that mode of trial was desirable. The objections stated by him to the jury system are, first, the frequency of disagreement and consequent discharge of the jury. Secondly, a judge in a doubtful case may suggest a compromise, and save the parties large costs, but a jury is silent. Thirdly, the silence of the jury during the trial prevents counsel from grappling with the points which are really affecting them. Fourthly, a judge gives reasons for his judgment, while no one knows on what grounds a verdict is given. Fifthly, the presence of a friend or a foe of one of the parties on the jury may, even though it be unconsciously, turn the scale. Sixthly, a strong judge impresses the jury with his view, yet the finding is that of the jury, whose reasons are inscrutable, and can only be set aside if twelve reasonable men could not have so found. Seventhly, trial by jury, in the complicated problems of mixed law and fact which arise in the present day, puts an undue strain upon the ingenuity of the judge in disentangling the points on which the opinion of the jury ought to be taken. A judge with a logical mind can far better deal himself with the questions *seriatim*, eliminating at once those which are obviously open to only one proper answer, than submit them all alike to the jury, who often make contradictory findings and reduce the verdict to an absurdity. Eighthly, jurymen are put to great loss and expense in attending for trials which could often be better and more expeditiously conducted without their presence, and in which that presence is often, by consent, dispensed with after much time has been wasted. Mr.

Jelf's communication will doubtless attract considerable attention. It will be observed that he is contending for a system similar to that which is established in this province.

An eminent doctor once stated that his errors—unavoidable errors—would fill a graveyard. Now we have evidence given by a dentist in a recent case of *Wright v. Neole*, before the Liverpool County Court, that there is not a practitioner in the land who has not at some time extracted a wrong tooth. The action was against a dentist by a victim. The dentist extracted a sound molar, instead of a decayed wisdom tooth, and then, without telling the patient what had occurred, tried to replant the sound tooth, thereby causing the patient great pain. The jury awarded the plaintiff five pounds damages.

The sudden illness of Baron Huddleston while on Circuit led to an unprecedented session at Lewes, Aug. 6. In consequence of a sudden and severe attack of gout in the course of the night the judge was utterly unable to leave his bed, and the medical gentlemen called in declared that the attempt to do so would be dangerous. The learned Baron at once telegraphed to London for assistance, but as no one could arrive within two or three hours, he thought it would not be well to keep the grand jury waiting all that time, so he considered whether he could not charge the grand jury in his bed. Happily, though the case had never before occurred, the terms of the commission of assize were wide enough to allow of it, for it was worded thus—'at such places and times as you may appoint,' and so the Baron 'appointed' his bedroom, and charged the grand jury in bed. The deputy clerk of assize announced in Court at the usual hour (eleven in the forenoon) that, by reason of the judge's illness, the assizes were adjourned to the judge's lodgings, and accordingly the high sheriff, attended by the under-sheriffs and the chaplain and the clerk of assize, and followed by twenty-three gentlemen of the county as grand jurors, walked to the judge's lodgings, and were ushered upstairs to the judge's bedroom. The high sheriff, with the two under-sheriffs, stood at the head of the

bed on one side, the clerk of assize on the other, and the gentlemen of the grand jury were ranged round the foot and sides of the bed. The usual formalities were then gone through, the commission was read, the names of the grand jurors were read over and they answered, and they were sworn in due form, and then the learned baron proceeded to charge them from his bed with his usual skill, clearness, and facility. It should be mentioned that at the judge's express desire the doors were left open and representatives of the press were present. His lordship said he desired it to be known that this was a public court, and that any of the public might come in who could—at which the grand jury laughed, the room being pretty full. The learned judge, who is seventy-three, subsequently resumed work with his usual energy.

COUR DE MAGISTRAT.

MONTREAL, 14 novembre 1889.

Coram CHAMPAGNE, J. C. M.

BOYER v. SLATER.

Manufactures — Règlements — Ouvriers — Amendes.

JUGÉ :—*Qu'un manufacturier qui emploie des ouvriers a le droit de faire, pour la régie de sa manufacture, des règlements qui lient les ouvriers qui les connaissent, entr'autres, d'imposer des amendes à ceux qui arrivent tard à l'ouvrage.*

L'action était en réclamation de salaire pour un montant de \$11.08, pour 6½ jours à \$10.00 par semaine.

Les défendeurs plaidèrent à l'action que le demandeur était engagé à la semaine et qu'il devait être payé tous les samedis, pour la semaine finissant la veille, qu'il devait se conformer à un règlement de l'établissement qui comportait entr'autres choses que si un employé arrivait plus de cinq minutes en retard, il devait perdre ½ de jour, et que le demandeur dans la semaine finissant le 25 octobre, celle réclamée, ayant perdu ½ heure, n'avait droit qu'à \$9.58, laquelle somme lui avait été offerte avant l'action, et déposée en Cour avec le plaidoyer.

PER CURIAM.—Les défendeurs avaient le droit de faire des règlements pour la régie

de leur établissement, et étant prouvé que le demandeur les connaissait, et s'y était déjà soumis, il n'avait pas droit pour sa semaine à plus qu'au montant offert.

Offre maintenue, avec dépens.

David, Demers & Gervais, avocats du demandeur.

McCormick & Ductos, avocats des défendeurs.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 25 novembre 1889.

Coram CHAMPAGNE, J. C. M.

CYR v. FRANCOEUR ET AL. & FOWLER ET AL.,
mis en cause.

Statut 51-52 Vict. ch. 27—Ouvriers—Saisie—Poursuite.

JUGÉ :—*Que le recours que le statut de Québec de 1888, donne aux ouvriers employés à la construction d'une bâtisse de saisir avant jugement pour leur salaire, par un simple avis, entre les mains du propriétaire, ce qui est encore dû aux entrepreneurs ou sous-entrepreneurs, n'enlève pas à ces ouvriers le droit de poursuivre ceux qui les ont employés.*

PER CURIAM :—Le demandeur, ouvrier maçon, ayant une réclamation contre les défendeurs, pour ouvrages faits à la maison des mis en cause, dont les défendeurs étaient les entrepreneurs, a produit entre les mains des dits propriétaires, sa réclamation conformément au statut de Québec, 51-52 Vict. (1888) ch. 27. Plus tard, n'étant pas payé, il aurait poursuivi les défendeurs et mis en cause les propriétaires. Les défendeurs ont contesté l'action; ils offrent d'abord de confesser jugement sans frais, puis allèguent qu'en saisissant ainsi entre les mains des propriétaires, le demandeur a choisi son mode de se faire payer, et qu'après cela il ne peut les poursuivre. Mais, le demandeur n'a pas, pour cela, perdu son droit d'action contre les défendeurs.

Jugement contre les défendeurs avec dépens.

David, Demers & Gervais, avocats du demandeur.

F. L. Sarasin, avocat des défendeurs.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 11 décembre 1889.

Coram CHAMPAGNE, J. C. M.

LOISELLE v. JOULIN ET AL.

Exception à la forme—Mari et femme—Signification—Domicile.

Jugé, sur exception à la forme :—10. *Que les défendeurs, mari et femme, étant poursuivis conjointement et solidairement, il doit leur être laissé, à chacun, une copie du bref et de l'assignation ;*

20. *Que les pièces laissées au mari, au domicile commun des défendeurs, sont une assignation suffisante pour les deux ;*

30. *Que le retour de l'huissier, qui n'est pas attaqué, faisant voir que copies des dites pièces ont été signifiées aux défendeurs, en parlant et en les laissant au mari, au domicile commun, est une assignation régulière pour les deux ;*

40. *Que dans le cas où la femme n'aurait pas été régulièrement assignée, ce n'était pas une raison suffisante pour le mari de demander le renvoi de l'action, la femme seule pouvant s'en plaindre.*

Autorités :—C. P. C. 59, 67 ; Frigon v. Côté, 1 Q. L. R. 152 ; Vermette v. Genest, 11 Q. L. R. 376 ; Duval v. Ancil, 16 R. L. 328 ; Dansereau v. Archambault, 1 Leg. News, 327.

A. Laferrrière, avocat du demandeur.

Lebeuf & Dorval, avocats des défendeurs.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 14 avril 1890.

Coram CHAMPAGNE, J. C. M.

BLANCHARD v. TERRILL.

Exception à la forme—Cause sommaire—Bref de sommation.

Jugé :—10. *Qu'il n'est pas nécessaire d'indiquer sur le bref que la poursuite n'est pas sommaire ;*

20. *Que le bref de sommation peut être fait rapportable un jour indiqué, sauf au défendeur à voir par la nature de l'action, si la poursuite est sommaire ou non, et s'il doit comparaître le jour même ou le lendemain.*

PER CURIAM.—Le bref de sommation en cette cause ordonnait au défendeur de com-

paraître un jour fixé, sans lui donner jusqu'au lendemain pour comparaître. Mais avant le statut de 1888, concernant les causes sommaires, les brefs étaient faits rapportables un jour fixe suivant la formule de l'appendice du Code de Procédure Civile No. 35 ; néanmoins, le défendeur avait jusqu'au jour suivant pour comparaître, par une coutume bien établie.

Autorités :—1097, 1099, 81, 83, 1065 C. P. C., Appendice No. 35 ; 37 Vict., ch. 8, sect. 7.

James Crankshaw, avocat du demandeur.

C. H. St-Louis, avocat du défendeur.

(J. J. B.)

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 272.]

A mill is insured :—Suppose two watchmen to be kept—two start and watch for a month, then for two weeks only one—then two again and mill destroyed by fire while two were being kept. Is the owner of the mill to get his insurance money ? or is it forfeited ?

If the risk be increased the insurer is discharged. For instance, if a ship insured is to sail from Quebec with twenty-five men, if she sail from Quebec with only twenty, though before loss she take in five more at Father Point, and go on, and sail in safety ten days after, afterwards being lost, the insurers are free, as in *De Hahn & Hartley* ; case of the African ship mentioned by Marshall and by the Lord Chancellor in *Rees v. Berrington*.¹

It is for the jury to say whether there has been a concealment of material facts, and whether facts not stated were material, or not.²

The Court must not take it upon itself to say that things not communicated were material.³

Yet the judge may state an opinion, not

¹ *Rees v. Berrington* is a case in the law of principal and surety. Vol. 2 [540] Vesey, Junior—Reports.

² *Campbell v. Rickards*, 5 B. & Ad.

³ *McLanahan v. Universal Ins. Co.*, 1 Peters R. p. 181.

withdrawing the case from the jury.¹ The ultimate test of materiality is "whether the risk be increased so as to increase the premium." *Per* Story J., in 1 Peters p. 188. *Ib.* [Seemingly, if the judge charge that a material concealment was to be held, and found, a new trial will be granted.] But see 1 Peters, Rep.

Where a policy is altered and the risk enlarged, the obligation of disclosing all material facts undoubtedly exists, and the effect of a concealment will render void the altered contract, and yet not restore the original contract, but will annul the whole policy. 2 Duer, Lec. 13, p. 429.

§ 169. *Alterations, and change of use of buildings insured.*

Increased hazard by mere temporary change in the occupation of a building, or by the occasional use of fire, or occasional deposit of hazardous goods after a policy has been effected, will not always avoid or vitiate a policy; unless a condition order that it shall.

A change to a hazardous trade from a non-hazardous, even without condition, will avoid the policy. The nature of the contract is such that if the risk be increased, the insurer (surety) is discharged, according to the principle stated in *Rees v. Berrington*. As in cases of deviation, however slight, the insurer is discharged; and as the Lord Chancellor in *Rees v. Berrington* said, the judge cannot try what mischief it may have done. It is sufficient that if the surety had been informed he might have declared unwillingness to continue bound.

Pim v. Reid,² was a case in which there was increased hazard after the policy had been effected, yet it was held not to vitiate the insurance. But the decision in this case, or in *Shaw v. Robberds*, must not be taken as deciding generally that a more dangerous trade can be carried on than is mentioned in a policy without vitiating the policy. The decision in *Pim v. Reid* was founded in part on the fact that the pleas did not state or show that a reasonable time had elapsed for giving notice. In *Sillem v. Thornton*,³ the

judgments in *Pim v. Reid* and *Shaw v. Robberds* are explained.

In *Shaw v. Robberds*,¹ the premises insured were described in part as a kiln for drying corn, and a condition stated, that unless the trade carried on in the insured premises be accurately described, or if a kiln or any process of fire heat be used and not noticed in the policy, the policy should be void; the sixth condition stated, that if the risk to which the insured premises were exposed should be by any means increased, notice should be given at the office and allowed by endorsement on the policy, otherwise the insurance should be void; it appeared that a cargo of bark had sunk near the premises of the insured, and he allowed the bark to be dried at his kiln grates, and in consequence of the fire during this process the premises were burnt down; it was found, as a fact, that drying bark was a more dangerous trade than drying corn; it was held that the use of the corn kiln for a different purpose from that intended at the time of making the policy was not a misdescription within the meaning of the third condition; secondly, that the said use of the kiln was not such an alteration or increase of risk as required notice to the office; thirdly, that no clause in the policy amounted to express warranty that nothing but corn should ever be dried, and that a warranty to that effect was not to be implied.

In *Sillem v. Thornton*,² the house insured was described as two stories, roof of zinc, with further particular description, and the description was part of the policy. It was held a warranty that the building should not be altered so as to increase the risk; and a third story having been added to it, and a new roof not covered with zinc having been put upon it, the house having been burned in a large fire, the insurer was held free. [In this case the question of increased risk was left to the Judges by consent.]

It is important in conditions like this to have the wording "so long as the same shall be so used" etc, else the insurance may

¹ *Ib.* p. 190.

² 6 Scott's N.R., 6 M. & G.

³ 26 E. L. & Eq. R.

¹ 6 Ad. & E.

² 18 Jurist 748; 26 E. L. & E. R.

become vacated through an user which ceased long before the fire.¹

A stock was insured in premises occupied by the insured, privileged for a printing office, bindery, &c., (*written so*). This clause, it was held, controlled the printed parts of the same policy, and *camphene* oil might be used, though a printed condition forbade it; the user being such as usual in a printing office and necessary in the printing and book business.²

In the United States also it is held that the change in the occupation of a building must be permanent, and the policy is not made void by the mere temporary exercise therein of a hazardous trade or vocation.³

In *Dobson v. Sotheby*⁴ a policy was upon "a barn, situate in an open field, timber-built, and tiled." The conditions required the usual description of the property. The policy was effected at the lowest rate of premium, such as was only payable for buildings where no fire is kept, and no hazardous goods deposited. There were articles fixing a higher rate of premium for buildings of other descriptions, with the proviso against hazardous goods; and a proviso, that "if buildings of any description insured with the company shall at any time after such insurance be made use of to stow or warehouse any hazardous goods" without leave from the company, the policy should be forfeited. The premises were agricultural buildings; but none of them such as, strictly, could be described as a *barn*, but they were such that they would have been insured at the same rate if they had been more accurately described. They required tarring; a fire was lighted in the warehouse, and a tar-barrel brought into the building for the purpose of performing the operation. By the negligence of the plaintiff's servant, and in his absence, the tar boiled over, took fire, and the premises were burned down.

It was contended that the plaintiff could not recover, 1st, because the premises were incorrectly described as a barn; 2d, because the lighting a fire was a contravention of the terms of the policy, which required that no fire should be kept in such buildings; 3d, that the tar-barrel came under the description of hazardous goods, which was a breach of the condition. But the plaintiff did recover. Is this not going far? The plaintiff's servant was negligent.¹

Lord Tenterden, C. J., said: "If the property insured has not been correctly described, the defendants are not liable; but I do not think there is in this case any misdescription which will discharge them. The word "barn" is not the most correct description of the premises, but it would give the company substantial information of their nature; the insurance would have been at the same rate whether the word "barn" or a more correct phrase had been used; I think, therefore, that they are substantially well described. Nor do I think that the other circumstances relied on furnish any answer to the action. If the company intended to stipulate, not merely that no fire should habitually be kept on the said premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to the case of hazardous goods also. In the absence of any such stipulation, I think that the condition must be understood as forbidding only the *habitual* use of fire or the *ordinary* deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen. I cannot therefore be of opinion, that the policy in this case was forfeited?

Notwithstanding what is said there of repairs to be allowed in all cases, a condition may prohibit them even; certainly hazardous repairs it may be stipulated shall not be allowed without permission of the

¹ The description "where no fire is kept" was held to mean "habitually kept." Smith, *Mercantile Law*, seems to approve.

¹ See *Flanders*, p. 510.

² *Harper et al. v. The N. Y. City Ins. Co.*, 22 N. Y. Rep. 1861.

³ *Gates v. Madison Co. Mut. Ins. Co.* 1 Selden, *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comstock, 122. In *O'Neil's* case, paint and turpentine were in a house that was being repaired, in its painting, or decoration. It is a good enough judgment, perhaps, if no condition of the policy prohibited.

⁴ 1 M. & M.

insurer. "Carpenters repairing buildings" is stated sometimes as extra hazardous.¹

Ordinarily, increase of risk from making reasonable necessary repairs is part of the risk on the insurers, and will not avoid a policy, but a clause in the policy may put the risk of any, even small, repairs on the insured.²

If a condition prohibit so, ought it to operate absolutely? Suppose that they have been made, that they took a week to make but have long been finished. Suppose fire to happen while they are going on. Query if then even the insurers ought to go free if the fire proceed from a foreign cause; but if a fire happen only six months afterwards and from a general conflagration, the insurers ought to be held to pay, *semble*. Parsons M. Law, p. 505.

In the conditions at head hereof the two clauses occurring together, *semble* the condition is restrained by the words, "and so long as the same be so appropriated."

Alterations that do not increase the risk do not affect the policy;—Art. 2574, C. C. of L. C.

Some policies avoid the insurance if any additions be made to buildings insured whereof written notice is not given to the Secretary, and endorsement made on the policy of the consent of the Board of Directors.

In *Lindsay v. Niagara District M. F. Ins. Co.*³ it was held that an addition without notice is fatal, although the Jury find the risk not increased. It is in vain to allege parol waiver against such condition and forfeiture. The verdict was for plaintiff. Rule afterwards to enter nonsuit was made absolute.

The plea in the above case alleged increase of risk. This allegation which was disproved, was held as mere surplusage.

"If the assured shall alter or enlarge a building so as to increase the risk or appropriate it to other purposes than those mentioned in the application," the policy

was held not avoided by an appropriation of the building to a new use which did not increase the risk;—*Rice v. Tower*.¹

A house was insured; afterwards change of occupation was allowed by a company once. Another change was subsequently made without allowance, but the jury specially found this one not to have increased the risk. It was held that the insurance company could not complain.²

In *Barrett v. Jermy*³ it was admitted that if an alteration increasing the risk were made and a fire took place, it would not be enough to show that the risk was increased, but that the loss was occasioned by the increased risk.⁴ Sed?

Glen v. Lewis, *post contra*; yet so the Court of Appeals held in *Casey v. Goldsmidt*.

In the note to page 374, 3 Kent's Com., it is said that in "*Shaw v. Robberds* the rule was stated to be that if the policy be silent as to alterations in trade or business carried on upon the premises, such alteration does not avoid the policy though the trade be more hazardous and no notice of the alteration."—But this is going too far. *Shaw* had not changed his trade; he had not taken to drying bark as a trade.

Suppose A. to insure his dwelling and outbuildings with description of all; afterwards he adds a building (increasing the risk); gives no notice of it. Fire happens in B's house, next door, and A's house and buildings are all destroyed. Are the insurers to pay A? They say no! A. says his additional building did not cause the fire, and that his dwelling house was burned first, and additional building last. Yet *semble*, A. has forfeited his insurance. Suppose his additional building had been burnt first, and that A's dwelling had taken from it. Surely A. would not recover anything.

In *Ottawa & Rideau Forwarding Co. v. Liver-*

¹ 1 Gray. See also *Hokes v. Cox*, 1 Hurl. & Norman. *Rice v. Tower* was approved in 1867 in *Lyman et al. v. State M. F. I. Co.*

² *Campbell v. Liverpool, London & Globe, F. & L. Ins. Co.*, 13 L. C. Jurist.

³ 3 Exch.

⁴ *Barrett v. Jermy* is for a case in absence of warranty. Flanders, p. 515. *Glen v. Lewis* was a case of warranty. See further, use of buildings, *post*.

¹ Generally the insured may make necessary and usual repairs, says Flanders, p. 532; but they must not go into alterations materially affecting the risk. See ante, *Dobson* case, which goes for allowing fire even.

² 18 N. Y. 188 (A.D. 1858.)

³ 28 U. C. Q. B. Rep. (A.D. 1869.)

pool, *London & Globe Ins. Co.*¹ it was held that change "of (or in) occupation," is different from "change in the nature of the occupation." But it was held by the Court if the condition is directed against change of occupant, it must be enforced. The person in actual occupation may be material, and may have led to the policy.

But if the condition be against change in the nature of occupation by which the degree of risk is increased, without notice, etc., *semble* both must concur, else the policy is not nullified.²

By the Liverpool & London Insurance Co's policy, condition 2, change in nature of the occupation is provided for. *Semble* change of occupant is different from "nature of the occupation," and the risk must be increased according to the condition of the above company to vitiate the insurance.

Alterations complained of should be averred to have increased the risk; otherwise as was said in *Stokes v. Cox*,³ if a house used for making fireworks were converted into an icehouse, the policy would be vitiated. So a plea is bad for not stating increase of risk.⁴

There must be occupation of the insured premises, or the policy is held to be of no force.⁵

§ 170. *Increase of risk by more hazardous trade.*

While the risk is running, no alteration ought to be made by the insured enhancing the liability of the insurer. A butcher's shop cannot be changed into a fireworks shop

with impunity; though no special condition of the policy prohibit it. Per Lord Campbell in *Sillem v. Thornton*.

In 8 Howard, 235, insurance was on a cotton factory. The insured represented in writing that there was "a picker inside the building, but no lamps used in the picking room." Fire took place originating in the picking room in which lamps were being used. A verdict for return of four years' premium was set aside upon a technicality, but the Court evidently was of opinion that the insurance company was free.

May manufacturing of barrels be incidental to business of flour milling; or tobacco pressing building insured described as used for "tobacco pressing, no manufacturing." The insured recovered, but the judgment was reversed.¹

Introduction of lamps is an aggravation of risk, and *semble* though no warranty were given, the policy ought to be, so, avoided.

Where a policy contained a clause prohibiting the use of a building for storing therein goods denominated in the memorandum annexed to the policy as hazardous, the keeping of such goods as oil and spirituous liquors by a grocer in ordinary quantity for his ordinary retail was held not to be, under the circumstances, a storing of them avoiding the policy.² I cannot but think that that decision was equitable and proper. Store implies accumulated quantity, provision laid up for the future purposes.

A condition avoiding the policy in case the building insured shall be used for the purpose of carrying on any one of certain specified hazardous trades, or any such trade generally, is not broken by exercising any such business in the building, provided it be auxiliary to, and necessary for, the business recognized in the policy as carried on therein. Thus, where a building was insured as a manufactory of hat bodies, and privilege was given in the policy for all the process of said business, it was held that the policy was not avoided by the existence of a carpenter's shop in the building, which

¹ 28 U. Ca. Q. B. R.

² *Ottawa & Rideau Forwarding Co. v. Liverpool, London & Globe Ins. Co.* 28 U. C. Q. B. Rep.

³ 1 H. & W.

⁴ *Johnston v. Ca. Farmers M. F. I. Co.* Com. Pl. Rep. Ontario, Vol. 28, referring to *Gould v. B. Am. Ass. Co.* 27 U. Ca. R.

⁵ "If building become vacant or unoccupied and so remain without notice to insurer and his consent in writing, policy is void." The tenant moved out and the house was vacated and unoccupied for 17 days, when it was destroyed by fire. Held that the policy was avoided. *Denison v. Phoenix Ins. Co.* Iowa, Sup. Ct. citing *Newton (ut supra) Harrison v. City F. Ins. Co.*, 9 Allen (Mass.), and other cases. For what is not such occupation, see *Poor v. Humbolt Ins. Co.*, a Massachusetts case in 28 Amer. Rep. There are conditions against vacancy. Must all kinds of buildings be never vacant—Schoolhouses for instance, at night, or in vacation time? See Albany Law Journal, A.D. 1890, p. 164.

¹ *Simms v. State Ins. Co. of Hannibal*, 4 Am. Rep. (*semble*; no manufacturing might well be held warranted, in favor of insurance company.)

² 1 Hall, 226.

was used for the purpose of repairing the machinery in such manufactory necessary for making hat bodies; notwithstanding the fact, that in the printed conditions of the policy, among the trades and occupations denominated extra-hazardous, the introduction of which into the building was to invalidate the insurance, was specified "carpenters in their own shops or in buildings repairing."¹

Thus, also, a policy on a chinaware factory, with a similar condition in regard to carpenters' shops, was held not to be invalidated by the fact that a room in the building was used by a carpenter in the ordinary and necessary business of the manufactory, as erecting shelves and making moulds and boxes, for instance.² The words "house building and repairing" mentioned among extra hazardous trades or businesses interdicted in the policy, were held not to apply to repairs made upon the building insured, but to mean carrying on the trade of house building or house repairing.³

The insured recovered, though his house was burned while undergoing extensive repairs. There was in the policy a condition that if the risk should be increased etc. the insurance should be void. Whether the risk had been increased in this case was left to the Jury, who found for the insured!

A city house was insured, no gas being in it. The insured introduces gas. Is this fatal to his policy if not allowed? *seem*—no! The use of gas being so common. To the above effect is Bunyon.

A policy of insurance was indorsed to the effect that in the event of any change in the occupation of the premises insured, of a nature to increase the risk, the insured should be bound to give notice thereof to the Company in writing. The premises were occupied as a saloon without notice to the Company. A fire having occurred:—*Held*, that the policy was voided.⁴

Insurance on a house with a building in rear used as a store house. If this be used

as a kitchen, without consent of the insurers the policy is useless and avoided.¹

Suppose a policy to cover a house "occupied as a grocery," surely notwithstanding clauses such as at the head of this section, ordinary grocery business may be carried on in that house, and liquors, and oils used and sold there.

¹ *Barrelet case*, 14 L. C. Rep.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Aug. 30.

Judicial Abandonments.

Joseph Cadieux, manufacturer, Montreal, Aug. 22.
Philip A. Donalds, merchant tailor, Ste. Cunégonde, Aug. 28.

John McNiece, tobaccoist, Montreal, Aug. 18.

Curators appointed.

Re Arnton Bros., coal dealers, Montreal.—S. C. Fatt, Montreal, curator, Aug. 23.

Re François Bourgoing, general merchant, Tadoussac.—N. Matte, Quebec, curator, Aug. 23.

Re C. H. Craig & Co.—F. Valentine, Three Rivers, curator, Aug. 17.

Re Gédéon Genest, St. Thomas de Pierreville.—Kent & Turcotte, Montreal, joint curator, Aug. 23.

Re M. Lajoie & Co., tinsmiths.—T. Gauthier, Montreal, curator, Aug. 23.

Re P. P. Lanoie.—C. Desmarteau, Montreal, curator, Aug. 23.

Re John McNiece, tobaccoist, Montreal.—E. H. Davis, Montreal, curator, Aug. 23.

Re William Rourke, grocer, Montreal.—J. N. Fulton, Montreal, curator, Aug. 22.

Dividends.

Re R. F. Dinahan.—First dividend, payable Sept. 10, Bilodeau & Renaud, Montreal, joint curator.

Re Norbert Lemaitre Duhaime.—First and final dividend, payable Sept. 23, H. Hebert, Montmagny, curator.

Re Aif. Laurin.—First and final dividend, payable Aug. 16, C. Desmarteau, Montreal, curator.

Re C. M. Lavigne.—First and final dividend, payable Aug. 16, C. Desmarteau, Montreal, curator.

Re Victor Turcotte, Sherbrooke.—Second and final dividend, payable Sept. 8, J. McD. Hains, Montreal, curator.

Separation as to Property.

Martine Chagnon vs. Aimé Sénécal, milkman, Montreal, Aug. 25.

Marie Anodine Fairant vs. George Robin dit Lapointe, builder, Aug. 22.

¹ *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459.

² *De Longuemare v. Tradesmen's Ins. Co.*, 2 Hall, 589.

³ *Grant v. Howard Ins. Co.*, 5 Hill, 10.

⁴ *Campbell v. Liverpool & London Ins. Co.*, 2 L. C. Law Journal, 224.

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PHASES OF QUEBEC LAW.

"*Phases of Quebec Law*," by "Victim," is the title of a pamphlet printed at Sherbrooke, which, as the preface states, is "an attempt to show, in narrative form, some of the features of our civil law imperatively calling for amendment." It purports to give the experience of a person who came from England and settled in this province. The new comer proceeded to employ his capital in loans at interest, on the security of real estate. The misfortunes of the lender are intended to illustrate defects in the law. Let us see what they were. "Victim" lost the amount of his first loan because the property securing it was sold for a trifle by the sheriff without his knowledge. The second loan was also lost, but in a peculiar way. "Victim," whom we shall call F., bid the property up when brought to sale, but was overbid by a person acting at the instance of a judgment creditor. The purchaser did not pay the price, and when the property was re-sold at his *folle enchère*, F. did not attend, and the property was then sold for a trifle to the judgment creditor. F. lost his third loan in consequence of the property securing it being sold for taxes, and the two years allowed for redemption had expired before he was aware of the sale. The fourth loan was lost in a more extraordinary manner. The borrower paid interest regularly for ten years, and then ceased to pay. F. found that he had sold the property soon after obtaining the loan, and the new owner had acquired a title by ten years' possession under his deed of purchase. The fifth loan was a small one of \$500, on a property valued at \$800. The mortgagor died. The property was brought to sale by a creditor. F. bought it in for \$800, and found that this amount was eaten up by expenses of last illness, costs of suit, and other privileged claims. The sixth and last loan was on personal security. The borrower repudiated his sig-

nature (a cross) to the note given by him, and F. was unable to prove his case because the witness to the signature did not believe in a future state of rewards and punishments, and his testimony could not be received under the law as it stands.

These are the six cases of hardship stated. The pamphlet, it may be observed, is written in an interesting style, and the points are easily apprehended. Now, although it is exasperating, and sometimes mortifying, to lose one's money through oversight or ignorance, that result is the usual one everywhere. Riches take to themselves wings; any fool can earn money, but it needs a wise man to keep it, are proverbial sayings. As to case No. 1, the law (43-44 Vict. c. 25) specially provides that a register for the addresses of hypothecary creditors must be kept in each registry office, and a notice must be sent by the registrar, by registered letter, to each hypothecary creditor, informing him that the immovable hypothecated to him is under seizure, and of the time when it will be sold. This disposes of case No. 1, because F. omits all reference to this provision. No. 2 is so peculiar that it hardly requires notice. After filing his opposition on the proceeds of the first sale, F.'s lawyer should have been on the look-out for his money, and should have been aware of the re-sale. Case No. 3, sale for taxes, is simply a case of want of vigilance. F. lends his money and allows the interest to fall three years in arrear. A person who embarks in a money-lending business ought certainly to know the law, or else act under advice of competent counsel. No. 4 is a very improbable case. A man who sold a mortgaged property would not be likely to go on paying interest for ten years on the loan, in order to avoid enquiry by the mortgagee. No. 5 is merely a case of imprudence in making a loan without sufficient margin. A person who makes a small loan must not imagine that the margin may be proportionately cut down. No. 6 presents a question of admissibility of evidence. We do not propose to enter into this question, but it may be observed that if it were left to the judge or jury to admit all evidence, and appreciate the value of it, we might have different judges acting upon

widely differing principles, and great uncertainty would result. It is probably safer to have a fixed rule in these cases, than to be subject to the caprice of the judge.

Upon the whole we do not see that "Victim" has made a very strong case. He says, "Why does not the sheriff sell what the defendant really owns, which is the property, *subject to the mortgages*, instead of selling the property itself which practically belongs to another person?" But the mortgages frequently exceed the selling value, and in that case no buyer could be found. A property is likely, other things being equal, to sell to better advantage, if the buyer can get a clear title, than if sold subject to a variety of claims, some bearing interest, and some not, necessitating a long calculation before the bidder knows what he is assuming.

SUPERIOR COURT—MONTREAL.*

Cour de Magistrat pour la cité de Montréal—Jurisdiction—Action hypothécaire.

Jugé:—Que la Cour de Magistrat pour la cité de Montréal a juridiction dans toutes les poursuites, jusqu'à concurrence de \$50, pour cotisations pour la construction et la réparation des églises, presbytères et cimetières, même dans les actions hypothécaires.—*Guillemette v. La Cour de Magistrat*, Gill, J., 17 mars 1890.

Vente—Meubles—Livraison—Reméré—En bloc.

Jugé:—1o. Que la vente de meubles réelle et de bonne foi, par un vendeur solvable, peut se faire et être parfaite, sans livraison, ni déplacement des meubles, mais par le seul consentement des parties, même dans le cas où le vendeur se réserve un droit de reméré;

2o. Que lorsque l'acte mentionne la vente "de tous les meubles garnissant mon hôtel, comprenant, etc.," la vente n'est pas en bloc, et ne comprend que les objets détaillés à l'acte.—*Bury v. Gagnon*, Bélanger, J., 28 avril 1890.

Judicatum solvi—Société commerciale.

Jugé:—Qu'une société commerciale, faisant

* To appear in Montreal Law Reports, 6 S. C.

des affaires à Montréal, dont un membre est absent du Canada, et n'y a pas de domicile, peut poursuivre sans être tenu de fournir un cautionnement pour les frais.—*Beaudoin et al. v. Desmarais, Taschereau, J.*, 5 mai 1890.

Capias—Affidavit—Suffisance des allégations.

Jugé:—Qu'il n'est pas nécessaire dans un affidavit pour *capias* alléguant que le défendeur ce cachait, recelait et avait recelé ses biens dans le but de frauder ses créanciers, d'indiquer la manière dont le demandeur a été informé des faits de recel, ni de donner les noms des personnes qui auraient donné les informations, comme il est nécessaire au demandeur de le faire dans l'affidavit pour l'émanation d'un *capias* pour cause de départ frauduleux de la province du Canada.—*Lachance v. Gauthier*, Taschereau, J., 19 mai 1890.

Substitution—Vente—Remploi—Eviction—Crainte de trouble.

Jugé:—1o. Que l'acheteur d'un immeuble sujet à une substitution, mais dont le grevé a, par l'acte créant la substitution, le droit de vendre en faisant le remploi du prix de vente pour les fins de la substitution, a droit de retenir le prix de vente jusqu'à ce que le vendeur se soit conformé aux conditions de l'acte en faisant le remploi.

2o. Qu'il ne suffit pas qu'il établisse avoir acheté une autre propriété, laquelle il entend payer avec l'argent provenant des biens substitués, il faut de plus qu'il fasse les déclarations nécessaires pour que les titres aux nouvelles propriétés ainsi achetées constituent un remploi en faveur des appelés à la substitution.

3o. Que la dite substitution avec faculté de vente aux conditions de remploi constituent pour l'acheteur un juste sujet de crainte d'éviction ou de trouble pour l'avenir.—*Desjardins v. Dagenais*, Gill, J., 10 mai 1890.

Capias—Affidavit—Allégations insuffisantes.

Jugé:—Que pour l'émanation d'un *capias*, une déposition alléguant que le demandeur recelait ses biens et était sur le point de quitter la province de Québec est insuffisante,

et tel *capias* peut être cassé sur requête.—*Blondin v. Desjardins*, Wurtele, J., 10 juin 1890.

Lettre de change—Jurisdiction—Acceptation.

Jugé :—1o. Qu'une lettre de change, faite et datée à Montréal, payable à Montréal, mais acceptée par les défendeurs à Coaticook, ne peut être recouvrée en justice à Montréal, la Cour n'ayant pas de juridiction; l'action doit être intentée au lieu où la lettre de change a été acceptée, ce dernier endroit étant le lieu où a pris naissance le droit d'action.

2o. Qu'une lettre de change acceptée sans que rien n'indique à quel endroit elle a été acceptée, est censée l'être au domicile de celui qui l'accepte.—*Lockerby v. Weir*, Mathieu, J., 22 mai 1890.

Défense en droit—Réponse—Faits et droit—Motion.

Jugé :—1o. Que l'on ne peut dans une réponse à une défense en droit alléguer des questions de faits.

2o. Que l'on ne peut non plus dans une réponse à une défense en droit faire des allégations qui tendent à expliquer ou compléter la déclaration de manière à rendre sans effet la défense en droit.

3o. Que ce qu'il y a d'illégal dans une pareille réponse, pourra être rejeté sur motion.—*Bourbonnais v. Dufresne*, Mathieu, J., 8 oct. 1889.

Constitutional Law—Executive power—Commission of Inquiry—R. S. Q. 596, 598.

Held :—1. An inquiry into an alleged attempt to influence and corrupt members of the Provincial Legislature is not a "matter connected with the good government of the province," within the meaning of R. S. Q. 596.

2. A commission of inquiry issued by the Lieutenant-Governor-in-Council under the said section is not a judicial tribunal, and does not possess any inherent power to commit for contempt.

3. The Provincial Legislature, for enforcing a law made by it, must enact a specific fine, penalty or imprisonment, and cannot confer the power upon any person or body of per-

sons of determining what punishment shall be incurred by a violation of such law, and it has no power to confer the jurisdiction of a Superior Court, or the authority of a judge thereof, on any officer appointed by the Provincial Government; and therefore R. S. Q. 598 is unconstitutional.—*Tarte v. Beique, & Turcotte*, intervenant, Wurtele, J., July 25, 1890.

Insolvable—Commerçant—Hypothèque.

Jugé :—Qu'un commerçant insolvable ne peut valablement accorder d'hypothèque sur ses biens au détriment de ses créanciers en général, quand même celui en faveur de qui l'hypothèque est donnée ignorerait l'insolvabilité du débiteur.—*Stevenson v. Lallemant*, Jetté, J., 30 nov. 1889.

Traverses des rues—Cheval et voiture—Vitesse—Dommages—Responsabilité.

Jugé :—1o. Que la prudence la plus ordinaire, ainsi que les règlements municipaux, obligent tous ceux qui conduisent des voitures à modérer l'allure de leurs chevaux en traversant les rues.

2o. Qu'en vertu de ce devoir, une personne dont la voiture et le cheval sont conduits avec une assez grande vitesse, et qui frappe un enfant qui traverse la rue, assez gravement pour amener la mort de cet enfant, sera responsable au père de ce dernier du dommage qui lui en résultera.—*Kennedy v. Courville*, Mathieu, J., 28 mai 1890.

Femme commune en biens—Cautionnement du mari—Communauté.

Jugé :—1o. Qu'une femme commune en biens ne peut valablement s'obliger avec son mari qu'en qualité de commune; mais qu'une dette contractée par elle, du consentement de son mari, devient dette de la communauté et, par conséquent, une dette personnelle du mari, et peut être poursuivie tant sur les biens de la communauté que sur ceux du mari;

2o. Que la femme commune en biens ne peut pas être poursuivie pour une dette de la communauté pendant sa durée;

3o. Que l'obligation que contracte le mari en cautionnant la dette de sa femme com-

mune en biens, n'est pas un cautionnement, mais un véritable engagement personnel, la femme n'ayant pu s'engager que comme commune, et le consentement du mari en faisant une dette de la communauté et du mari.—*Perrault v. Charlebois*, en révision, Johnson, J. C., Davidson, DeLorimier, JJ., 28 juin 1889.

Cité de Montréal—Règles du Conseil—Reconsidération des questions.

Jugé :—Que pour appliquer la 26e Règle du Conseil-de-Ville de la cité de Montréal qui défend de reconsidérer à la même séance une question plus d'une fois, il faut que la question soit identiquement la même; qu'ainsi la Règle ne s'applique pas lorsque le Conseil a nommé un employé, puis a reconsidéré son vote pour en nommer un autre, et qu'elle reconsidère de nouveau son vote pour renommer le premier; dans ce cas, la première reconsidération s'appliquait au premier nommé, tandis que la seconde reconsidération s'applique au second nommé.—*Vannier v. Cité de Montréal*, Taschereau, J., 28 juin 1889.

Servitude—Vue—Tolérance—Dommages—Assaut.

Jugé :—Que bien qu'un voisin n'ait pas le droit de pratiquer des vues dans son mur, du côté de son voisin, en dedans de la distance voulue par la loi, néanmoins celui qui souffre et tolère cette servitude sans se plaindre, ni protester, durant plusieurs années, ne sera pas reçu ensuite à réclamer des dommages, si ce n'est une somme nominale pour violation du droit que, dans l'espèce, la Cour a fixé à \$5.

2o. Qu'une personne assaillie qui a porté une plainte pour assaut devant le juge de paix, ne peut, lorsqu'il y a eu ainsi procès, poursuivre ensuite en dommage devant les cours civiles.—*Langevin dit Lacroix v. Bourbonnais*, Tellier, J., 12 nov. 1889.

DECISIONS AT QUEBEC.¹

Action hypothécaire—Exception de subrogation—Art. 2071, C. C.

Jugé :—Que le cessionnaire du prix d'une première vente, qui a accordé à un subsé-

quent acquéreur de la même propriété pour un prix moindre, un délai plus long que celui stipulé par la première vente, et s'est obligé envers ce second acquéreur de décharger l'hypothèque affectant sa propriété pour le paiement du prix de la première vente, n'a pas d'action contre son cédant, qui s'est obligé de fournir et faire valoir, ni contre le détenteur de la propriété affectée à cette garantie par son cédant, avant l'expiration du délai qu'il a ainsi accordé, ni pour l'excédant du prix de la première vente sur celui de la seconde.—*Gagnon v. Brochu*, en révision, Casault, Caron, Andrews, JJ., 31 janvier 1890.

Vente d'immeuble—Privilege du vendeur—Enregistrement—Arts. 2014, 2015, 2094, 2098 et 2168, C. C.

Jugé :—1o. L'enregistrement, près de cinq ans après la mise en force du cadastre officiel, d'un acte de vente immobilière passé avant cette mise en force et ne contenant la désignation de l'immeuble vendu que par tenants et aboutissants, conserve le privilège pour le prix de vente, lors même que cet enregistrement n'est pas accompagné d'un avis au régistrateur du numéro sous lequel l'immeuble en question est désigné au plan et livre de renvoi du dit cadastre;

2o. Entre les créanciers les privilèges ne produisent d'effet à l'égard des immeubles qu'autant qu'ils sont enregistrés, mais le privilège du vendeur d'un immeuble est effectif à l'encontre des créanciers dont les titres de créance ne sont pas enregistrés;

3o. L'enregistrement d'un acte de vente, ou d'une obligation déguisée sous forme de vente, est sans effet, si le titre d'acquisition du vendeur, ou du débiteur, ne paraît pas avoir été enregistré.—*Bernard v. Bernard*, en révision, Casault, Routhier, Caron, JJ., 31 mars 1890.

Injonction—Chemin de fer—Règlement d'une corporation de ville accordant un bonus—Pouvoirs en vertu de sa charte—Flusses représentations—Non-accomplissement des conditions—Illégalités et nullités.

Jugé :—Que, dans les circonstances de la cause, il n'y avait pas lieu au bref d'injonc-

¹ 16 Q. L. R.

tion pour empêcher la ville de Fraserville de remettre à la Compagnie du Chemin de Fer de Témiscouata, comme *bonus*, des débetures au montant de \$25,000, accordées en vertu d'un règlement du conseil municipal de la dite ville, dûment passé, et approuvé par un vote des contribuables.—*Bélanger & Cie. du Chemin de Fer de Témiscouata*, en appel, Dorion, J. C., Cross, Church, Bossé, JJ., 5 oct. 1889.

Locateur et locataire—Réparations.

Jugé :—Que le locataire n'a pas le droit de poursuivre pour réparations faites à la maison, avant d'avoir mis le propriétaire en demeure de faire les dites réparations.—*Gincheveau v. Lachance*, C. C., Routhier, J., 17 fév. 1890.

Contrat de vente—Droits de l'acheteur—Paiement du prix différé—Péril d'éviction—Cautionnement—Intérêts—Prescription décennale—Bonne foi—Plaidoyer au fond—Déclarations à l'audition—Signification de transport à un absent—Arts. 1535, 1571, 2251, C. C., et 5814 S. R. Q.

Jugé :—1o. L'acheteur d'un immeuble qui a juste sujet de craindre d'être troublé au péritoire, peut différer le paiement du prix jusqu'à ce que le vendeur lui fournisse caution de le rembourser, à moins d'une stipulation contraire;

2o. Il peut invoquer ce moyen par une défense au fond à une action intentée pour le prix, et, sur des conclusions simplement au renvoi de l'action, le tribunal peut permettre au demandeur de fournir le cautionnement.

3o. L'acheteur, quoiqu'il puisse différer le paiement du prix pour cause de péril d'éviction, est néanmoins tenu d'en servir les intérêts;

4o. L'acheteur d'un immeuble qui sait que son vendeur n'en est pas propriétaire avec titre valable au moment de la vente, n'est pas dans les conditions de bonne foi voulues pour acquérir par la prescription de dix ans.

5. Le défendeur qui invoque plusieurs moyens dans ses plaidoyers écrits, et qui déclare à l'audition de la cause n'insister que sur un d'eux, renonce, par là même, aux au-

tres, et le tribunal ne peut en tenir compte en adjugeant sur le litige;

Semble :—La signification d'un transport à un absent en en laissant une copie à son procureur est insuffisante, la loi en prescrivant un autre mode à l'art. 5814 S. R. Q.—*Dessert v. Robidoux*, en révision, Casault, Routhier, Andrews, JJ., 5 avril 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 280.]

The clauses at the head of this section cannot be interpreted to prevent any person from having oil or liquor stored in his house for his own use.

Mere alterations in a building insured do not always increase the risk; immaterial alterations may be made; the insured may alter the fire places in his house, even make new ones; such alterations of themselves do not or may not increase the risk, but the *using* may. In such cases, it is not sufficient for the insurer to prove the alteration, he must also show that its use followed, and that the risk was thereby increased. Where after insurance of a building, the insured changed the position of two boilers from the outside to the inside of the building, and the judge directed the jury to consider whether the alteration increased the risk, it was held a misdirection, the question being whether the *use* of the boilers after the alteration increased the risk.¹

Would mere using *once* avoid the policy? *Shaw v. Robberds*, and *Pim v. Reid* go to require the use to be of a permanent character. But the use *at all* may be prohibited; and, under certain condition, the mere using once will avoid the policy. If a policy prohibit the introduction of any description of fire heat into a building, and an engine be, afterwards, placed in it, and tried, with fire heat, and after some days

¹ *Barrett v. Jermy*, 3 Wels. Hurl. & Gordon, 535 (A.D. 1849.)

the building be burned down, the policy will be avoided. The length of time of user of fire heat is of no importance in such a case. Let the clause read, "so long as etc." and the policy may be saved, but policy words must always work. The mere introduction of the steam engine, of course, could not have been fatal.¹ The Chief Baron at the trial of this case charged that, if the use of fire was merely temporary and by way of experiment, the policy was not avoided. On motion of defendant, afterwards, this ruling was declared bad.

Using a steam engine for grinding, the jury finding no increase of risk (and in most cases there can be none) will not vitiate the policy—(a steam engine was mentioned in the policy). So gas burners may be multiplied, or candles.²

Alterations may suffice, in the absence of express condition, to avoid the insurance; e. g. where a description is given of premises and such description is held a warranty; but if there be an express condition, say, if the risk be increased by any alterations or by the deposit of hazardous goods, then the policy to be vacated, it will not be vacated though these be introduced if the jury find "no increase of risk ever to have been." *Stokes v. Cox*³ was a case of new erection of machinery, after an insurance. A boiler was in the building when insured. Afterwards an engine was added. There was a condition in the policy requiring notice "if the risk was increased." The jury found that there had been no increase of risk; and though no notice had been given, the policy was held not avoided, and the plaintiff finally recovered. Under the general law of insurance, the insured may be required to give notice of changes in buildings; under a policy with express condition on the subject he may be under obligation to do so only if the risk be increased. [Insurers sometimes fare worse by the extra precaution taken by them of making express condition, as in this case.]

¹ *Glen v. Lewis*, 17 Eng. Jurist; 8 W. H. & Gordon. A warranty, condition precedent, whether material or immaterial, must be observed. Flanders, p. 228.

² *Bacendale v. Harvey*, 4 Hurlst. & Norman.

³ 1 Hurlstone & N., 3 Jur. A.D. 1856.

Under a plea of "alterations, and increased risk not notified to the insurer," the *onus probandi* is on the insurer,—*per* Parke, B., in *Barrett v. Jermyn*. (The insurer affirms all that, so let him prove.) But if the insurer plead that material alterations were to avoid the policy unless notified, then, *semble*, he need only prove material alterations, and want of notice will be presumed; burden of proving notice is on the insured.¹

Where a man builds on a lot of land adjoining my house insured, that does not avoid my insurance, unless a condition *casuelle* is in my policy for such a case. *Duranton*, Tom. xi., No. 17.

Is the insured bound to announce to the insurers the fact of another man's building alongside of him? Not, unless by a condition he has bound himself to do so.

A building insured under a policy avoiding the policy if the risk were rendered more hazardous by means within the control of the insured, described as contiguous, on one side only, to other buildings, may be made contiguous on both sides, and *non constat* that the risk is increased; it may be diminished.²

Angell, § 162, says that if there be no stipulation in respect of increase of risk by erecting adjacent buildings, a prohibition of so important a character is not to be implied, and the policy is not avoided by subsequent erection of buildings adjacent to the one insured. He cites *Stebbin's* case in 2 Hall.

In the absence of stipulation to that effect, the erection of a building adjacent to the one insured by the party holding the policy, though it might increase the risk, will not avoid the policy. But if such act of the assured was to cause loss to the company, the insurers would not be held liable, as he, the insured, caused the loss.³

Suppose a dwelling-house turned into a fireworks factory, and loss to happen after—

¹ See *Gardiner v. Piscataquis M. F. I. Co.* 38 Maine.

² *Sitton v. Massachusetts M. F. Ins. Co.*, 4 Mass. R. But one of the judges dissenting, said if such were caused by the insured's selling, it might vacate such a policy. Also that such contiguity of buildings extra necessarily increased the risk.

³ *Howard v. Ky. & L. M. Ins. Co.*, 13 B. Monroe Ky. 282.

wards in a general conflagration? The insurer would be liable, *semble*.

Can a man insure, describing his house as bounded on one side by vacant land of his own, and afterwards build a cotton factory on that land, and say that he was not bound to say anything to insurance company unless bound to do so by express clause of his policy? Not in *foro conscientie*, and in France not, by law.

The use of a building, a shoe manufactory, for drawing a lottery does not vacate a policy insuring it; unless there be a connection between the fire and that use.¹

Evidence as to an usage in New York that, upon risk increased, notice is to be given to the insurers; so that they may exercise the option of continuing, or annulling the policy, cannot be received to alter the legal effect of the policy.²

Under my system, usage would not be wanted to help the insurers, for where the risk is materially increased by the insured's acts, the insurers are discharged.

Increase, or not, of risk, or whether alterations increase the risk, is a question for the jury.³

§ 171. *Resemblances between Assurance and Suretyship.*

The surety runs risks and uncertain chances. The creditor wants to be assured against loss through the debtor's not paying or not being able to pay.

The difference is, insurance is a principal contract; suretyship an accessory.

The convention *del credere* makes a contract of insurance—*Casaregis*. Obligation of person assuming risk for *del credere* commission is a distinct separate obligation. (Contract of insurance.)

Gratuity is of the nature of suretyship, but not of its essence. No. 15, Troplong, *cautionnement*.

If the creditor pay the surety to guarantee him against insolvency of debtor, it is "véritable assurance," says Troplong, No. 16.

Scaccia says: "Contractus assecurationis

in substantia est contractus fidejussionis." This is true where the surety is paid as by creditor above. But if it were the debtor who paid the surety to bind himself towards the creditor, this would not be a contract of insurance, says Troplong, (but *louage* probably.)

Ordinary *cautionnement* is a contract unilateral. The creditor binds himself to nothing, and so the contract is unilateral. But in insurance both contract expressly. *Semble, contrat synallagmatique*. Yes! says Troplong.

The insurer, a cautioner, must be freed often, where changes are made. *Cautionnement* cannot be extended from one thing or case to another. We are recommended "de ne pas étendre l'engagement de la caution au-delà des limites dans lesquelles il a été contracté." No. 148, Troplong, *Cautionnement*.

An alteration in the obligation or contract in respect of which a person becomes surety, discharges him, unless he has consented to the contract so altered. Ch. viii., Suretyship.

Any subsequent addition to, or deviation or alteration from the contract, is such an alteration as discharges the surety—Ib.

The cautioner is freed by any essential change consented to by the creditor without the consent of the cautioner. (Bell's principles.)

If there be alteration in the constitution of an office it ceases to be that in respect of which the surety became bound for the principal, and the surety will be free, unless he authorize or consent to the change of constitution of the office.

If by act of the creditor or by Act of Parliament, the duties of an office are changed, so that the peril of the surety is increased, the surety is free.¹

An insurance company insures A's dwelling house occupied by A, for £500, and outbuildings in rear, £250. A knocks down his dwelling to rebuild it. While it is down and the ground on which it stood is empty, A not using his outbuildings, these are burnt at night. The insurance company say they are free. Are they? If a condition ordered

¹ *Boardman v. Merrimack M. F. I. C.*, 8 Cushing. 5154 a. Angell.

² 1 Hall R. 632.

³ 10 Pick. 585.

¹ *Oneald v. Mayor of Berwick*.

vacancy of occupation to be announced to the insurance company it might be so; but in the absence of condition such as that, could it be said the risk was aggravated? Perhaps so, but this would be for the jury, I suppose.

§ 172. *Loss by fire happening by invasion, &c.*

"No loss or damage by fire happening by any invasion, foreign enemy or any military or usurped power whatsoever will be made good by this company."

Such is a condition contained in many English policies; others add "civil commotion" to the excepted cases, and others "riot and tumult." The *historique* of these exceptions, and the meanings of these words can be gathered from the remarks of the judges in *Drinkwater v. Lond. Ass.*¹ and in *Langdale v. Mason*², to which so much space is given up in the early works on insurance.

The United States policies generally state this condition thus: "This company will not be liable for any loss or damage by fire happening by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power." Are these words synonymous?

In 40 Connecticut Rep. is *Boon v. Etina Ins. Co.*, where the U. S. Circuit Court held defendants liable though the fire was caused by the U. S. military orders.³

If, in an action on a policy which frees the insurer from loss arising from riot, civil commotion, etc., the declaration sets forth the policy, and negatives that the loss arose from civil commotion, but be silent about riot, it is bad on general demurrer, for riot and civil commotion are not synonymous.⁴

In New York it has been held that the words "usurped power" mean an usurpation of the power of Government, and not a mere excess of jurisdiction by a lawful magistrate.⁵

Where the loss happens by war or invasion, the insurance company goes free,

though the fire be caused by simple imprudence of the enemy established in a town or place. Clauses stipulating against losses by war or invasion are to read more largely than one that reads only of war. *J. du Pal.* of 1872, p. 198, C. de Cassn.

When there is a stipulation against war, war must be the cause direct and immediate of the loss. *Ib.*

§ 173. *Damage by Lightning.*

It is a condition in many American policies that "the company (insuring) will not be liable for damage to property by lightning aside from fire."

Of course, under such a condition the insurers could not be held liable for loss from the rending of the house without burning.¹

Some companies say that they "will make good losses sustained by lightning." Some English policies read: "This company will make good losses on property burnt by lightning;" others read thus: "Losses by lightning will be made good."

Upon all these I would remark that under a policy against fire containing no exception of fire by lightning, loss from this last would have to be paid for. Under a fire policy not mentioning lightning, injuries caused by lightning without any combustion, I should say, would not be losses within the policy. Lightning may shiver masonry and scatter timbers without burning anything.

What of the clause, "losses by lightning will be made good?" Is this to be limited to losses from combustion, or would it cover loss from mere shivering of masonry, scattering of timbers and so forth? But for the body of some policies having that clause mentioning only losses by fire as to be made good by the insurers, the question would be easy to answer.

In France the clause is sometimes made very clear for the case of ruin or loss from lightning, though unaccompanied by combustion. 2 *Alauzet*, p. 354. *Pardessus*, vol. 2, p. 602, Dr. Comm., holds that, under ordinary policies, in the case of a thunderbolt injuring a house, the insurer is liable as if fire had done it. *Sed query?* At p. 51, *Agnel* says, lightning without combustion, yet insurance company to pay. *Cour de Cassation.*

¹ 2 Wils.

² 2 Park.

³ See *Albany Law Journal*, Nov. 1875, p. 338.

⁴ *Conklin v. Home D. M. F. I. Co.*, 2 U. C. Rep.

⁵ 21 Wend. 367. Military power or usurped power in policy conditions means the same thing. Military and usurped power means rebellion conducted by authority. *January, 1880, Virginia. Portsmouth Ins. Co. v. Reynolds*, p. 499, *Alb. L. J.*, of 1880, vol. 1.

¹ *Babeock v. Montgomery M. I. Co.*, 6 Barb. R.

The Legal News.

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The *Scottish Law Review*, on the subject of judicial remuneration, gives some figures which are interesting. The thirteen judges of Scotland receive £49,400 amongst them, or an average of £3,800 each. In England there are thirty-four judges, counting Lords Watson and Morris as English judges. The Lord Chancellor receives £10,000 per annum; the Lord Chief Justice £8,000; the three Lords Ordinary of Appeal and the Master of the Rolls £6,000 each; and the remaining twenty-eight judges of first instance and of appeal, £5,000 each: in all, £182,000, or, on the average, £5,353 each. In Ireland there are twenty-two judges who receive altogether £81,300, or £3,695 on the average each. The diversities of salary are considerable. The Lord Chancellor receives £8,000 per annum; the Chief Justice, £5,000; the Chief Baron £4,600; the Master of the Rolls, the three Lords Justices of Appeal, and the Vice-Chancellor, £4,000 each; the two judges of the Bankruptcy Court, £2,000 each; the Admiralty judge, £1,200; and the remaining eleven judges, £3,500 each. The remuneration of County Court judges, (of whom there are fifty-seven) is now fixed by Statute at £1,500 per annum and travelling expenses. There are also twenty-six metropolitan police magistrates; the senior receives £1,800 per annum, and the rest £1,500 per annum. In India the salary of a judge of the Supreme Court ranges from £4,500 to £7,200; in the more important parts of Australia, from £1,700 to £3,500. In continental Europe judicial salaries are small. In the Imperial or highest Court of Appeal in Germany the ordinary judges have only £600 a year, and the president £1,250 and an official residence. In France, with 18,650 judges, the salaries of local judges range from £75 in the lowest class to £320 in the highest. In Austria and Holland the salaries of local judges are from £150 to £250; in Russia from £244 to £350; in Belgium £120; in Switzerland £180; and in Italy £100.

In *Gordon v. Silber*, Lord Justice Lopes decided, Aug. 9, that where husband and wife are guests at a hotel, the landlord has a lien on the goods of the wife for the expenses of the husband and wife. The question does not appear to have been previously decided in England. The husband had been staying at the hotel for some time alone, and had incurred expenses which he had paid; he was then joined by his wife, who came to the hotel with a large quantity of luggage, which it was admitted was her separate property. The husband and wife occupied the same rooms, and they remained at the hotel together for some time, the husband leaving some days before the wife. The husband having become insolvent, it was sought to render the goods of the wife liable for the balance of the hotel bill incurred by husband and wife. Lord Justice Lopes said, it is only fair to give the innkeeper rights co-extensive or commensurate with his obligation to receive his guest and keep his goods safely and securely, and in accordance with this principle, as the guests received were the husband and the wife, and as all the goods received by the hotel-keeper were received by him as the goods of the husband and the wife, and as he was responsible for all the goods so received by him, whether they belonged to the husband or the wife, his right of lien was co-extensive with these liabilities, and extended to all the goods which had been brought by his guests to the hotel, whether they were the separate property of the wife or not, inasmuch as such goods satisfied the condition laid down by Chief Justice Wilde in *Smith v. Dearlove*, 6 C. B. 132, where he said, "The right of lien of an innkeeper depends upon the fact that the goods came into his possession in his character of innkeeper as belonging to a guest."

PUBLIC SPEAKING.—*Lysias*, says Plutarch, wrote a defence for a man who was about to be tried before one of the Athenian tribunals. Long before the defendant had learned the speech by heart, he became so much dissatisfied with it that he went in great distress to the author. 'I was delighted with your speech the first time I read it; but I liked it less the second time, and still less the third time; and now it seems to be no defence at all.' 'My good friend,' said *Lysias*, you quite forget that the judges are to hear it only once.'

SUPERIOR COURT.

[IN CHAMBERS.]

SHERBROOKE, Aug. 15, 1890.

Coram WURTELE, J.

McMANAMY et al. v. CORPORATION OF THE CITY
OF SHERBROOKE.*Procedure — Injunction — Case before Supreme
Court.*

Held:—*That when an appeal to the Supreme Court of Canada, from a judgment of the Court of Queen's Bench sitting in appeal, has been regularly allowed, and the case is before the Supreme Court, the Superior Court has no power by injunction, to suspend or interfere with the proceedings before the Supreme Court; the remedy being by application to the Supreme Court.*

The judgment was as follows:—

"We the honorable Jonathan S. C. Wurtele, one of the judges of the Superior Court for the Province of Quebec, after having heard the parties, by their counsel, upon the application of the petitioners for the issue of a Writ of Injunction against the respondent ordering and enjoining it to suspend all proceedings in connection with an appeal instituted by it to the Supreme Court of Canada in a certain cause wherein the respondent was plaintiff, and the petitioners were defendants, until the petition which has been served upon the respondent and by which the petitioners ask for the annulment for the cause of illegality of the resolution of the Council of the City of Sherbrooke, authorizing the appeal, has been adjudicated upon; having examined the petition for the Writ of Injunction and the exhibits produced in support thereof and having deliberated;

"Seeing that the petitioners allege that the resolution authorizing the institution of the appeal to the Supreme Court of Canada in the above mentioned case, adopted at a special meeting of the Council of the City of Sherbrooke on the 28th day of June last (1890), is null by reason of illegalities in the proceedings of the Council prior to and in connection with its passing, and that they are proceeding to obtain its annulment by a petition which was duly served on the respondent on the 26th day of July last (1890), and

which will be presented to the Circuit Court for the district of St. Francis on the 1st day of September next (1890), and that they ask for a Writ of Injunction to restrain the respondent from proceeding with its appeal until the petition asking for the annulment of the said resolution has been adjudicated upon;

"Considering that the appeal to the Supreme Court has been allowed by one of the honorable judges of the Court of Queen's Bench of the Province of Quebec, and that another of the judges of the said Court has settled the case for the appeal;

"Considering that the appeal in the said case is now regularly before the Supreme Court of Canada, and that the Superior Court for the Province of Quebec, which is a Court inferior to it, has no power to retard, or in any way to interfere in the proceedings therein;

"Considering that it is possible for the petitioners to obtain the suspension of proceedings, which they desire to get, by applying to the Supreme Court or to one of the judges thereof under rule 42 of the general rules and orders of the Court;

"Considering that the petitioners have an easy remedy without recourse to a Writ of Injunction against the respondent;

"Considering moreover that under and in conformity with Article 461 of the Municipal Code, the said resolution of the Council of the City of Sherbrooke is executory until its annulment has been decreed by either the Magistrate's Court or the Circuit Court, and that it should therefore be left to its effect;

"Considering that the effect, whatever it may be, will not be irremediable, and that the respondent is responsible under the provisions of Article 706 of the Municipal Code for all the damages which the petitioners may suffer by reason of its enforcement should it be subsequently annulled;

"Considering that under the circumstances a Writ of Injunction does not lie in the present instance;

"Do refuse to order the issue of the Writ of Injunction prayed for, and do reject the petitioner's application therefor, but without costs."

L. C. Bélanger, for petitioner.

H. B. Brown, Q. C., for respondent.

SUPERIOR COURT—MONTREAL.

Billet promissoire—Signature en blanc—Responsabilité du faiseur—Tiers.

Jugé:—Qu'une personne qui donne à une autre personne un billet signé en blanc, avec l'entente que cette dernière le remplira pour une somme déterminée, est responsable vis-à-vis d'un tiers, du plein montant qui apparaît à la face du billet, quand même il serait plus élevé que celui convenu; le signataire du billet ne fait alors que subir les conséquences de sa propre négligence.—*Bank of Nova Scotia v. Lepage, Pagnuelo, J., 9 octobre 1889.*

Opposition—Mise en demeure—Parties en cause.

Jugé:—Que même dans une cause où le défendeur n'a pas comparu, la Cour ne peut adjuger sur une opposition sans que toutes les parties en cause aient été préalablement mises en demeure d'admettre ou de contester l'opposition.—*Lang Manufacturing Co. v. Cocker, Würtele, J., 13 juin 1890.*

Production des exhibits—Exception à forme—Parties en cause—Exception dilatoire.

Jugé:—1o. Que lorsque toutes les parties qui doivent être en cause, n'y sont pas, le défendeur ne peut s'en prévaloir par exception à la forme, mais par une exception dilatoire;

2o. Que quoique par l'article 103 du C.P.C. il est décrété que jusqu'à ce que les pièces aient été produites, le demandeur ne peut procéder sur sa demande, néanmoins, le défendeur peut également produire une exception dilatoire pour arrêter la poursuite jusqu'à la production des pièces nécessaires.—*Stewart v. The Molsons Bank, Mathieu, J., 2 mai 1890.*

THE COINAGE.—The Chancellor of the Exchequer, replying to a memorial signed by 153 members of Parliament, advocating that the value should be stamped on all British coins, says, in a letter to Mr. Sinclair, M.P., published at Belfast on August 12, that while he may, to a great extent, meet the wishes of the memorialists regarding the silver coinage, the familiarity of the public with the sovereign and the half-sovereign makes the risk of mistake with these coins infinitesimal. He is, therefore, reluctant to break with historical traditions and set a new precedent in their case.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 288.]

§ 174. *Buildings destroyed to prevent extension of fire.*

Ellis says that it "has become a practice of the London firemen in order to prevent the extension of a fire, to pull down, or blow up with gunpowder, the adjoining buildings. It would be difficult to assert that the common fire policy will, as regards such buildings, indemnify the insured in such a case." He adds: "It would be more prudent to introduce an express stipulation. In the policies of a recently well constituted company, explosion is expressly excepted from indemnity." This affords an argument for fire from gunpowder fired being a loss within policies not containing the exception. I can't doubt that if a house insured be blown up by firemen firing gunpowder in it the insurers have to pay.¹

In *City Fire Ins. Co. v. Corlies*,² it was held that the destruction of the property insured by the blowing up of it with powder under the direction of the Chief Magistrate of a city, was a loss within a policy against fire, and that a loss by the explosion of gunpowder is a loss by fire. The question of the necessity or legality of the explosion does not affect the liability of the insurers. It ought not to, under policies that do not contain the exception introduced by the well constituted company referred to by Ellis.

Demolition or destruction to stop the march of a fire. Who is to be judge of the necessity? *Seemle*, if necessary, the common safety allows the destruction. Ought the loss to be shared by all who are benefited? Yes! says *Bunyon*, as where general average is in

¹ A Massachusetts statute appoints that three persons designated may direct any house to be pulled down to stop fire: and in such case, if it is the means of stopping the fire, the city is liable for the value of the building.

² 21 Wend. 367.

marine insurance cases. In London the fire brigade can pull down houses to stop a fire (Act of 1865), and this shall be held damage by fire. In New York, houses may be pulled down or destroyed, the municipality is to pay all damage. If insurer pay he can go against the municipality in the name of the insured.

The common law of England allows any one to destroy a house if necessary for the public safety, and nobody shall be liable as for trespass, for so doing. 2 Kent's Comm., 338, 339; 12 Coke.

If firemen or magistrates, to stop a fire, pull down a house insured, the insurers are not liable under common policies; some French policies stipulate for this case in favor of the insured. Alauzet, vol. 2.

Under the Droit Commun of France, in case of *péril évident il est permis d'abattre les maisons voisines pour arrêter un incendie*.

Celsus scribit circa eum qui incendii arceudi gratia vicinas sedes intercidit... cessare Aquilise actionem. Sive pervenit ignis, sive ante extinctus est. Law 49 § 1. Digest ad legem Aquiliam.

Rarely, however, except in villages, can the case occur now, says Merlin, Rep. vol. 36, Voie de fait.

In cities, private persons can't do it, but magistrates may, says Merlin.

See what I have said in earlier chapter. In France companies pay where demolition takes place of house insured.

Suppose a house pulled down to arrest the progress of a fire. In New York the mayor was authorized to do this, and there was to be an assessment to pay it. If pulled down the insurers are not liable, and the insured had no other remedy than the one of moving for and getting the assessment.¹

P. 304, 17 Wendell. If the Legislature allow city magistrates to order a demolition, to stop a fire, and go no further, perhaps the city would not be liable to make up the loss; but the Legislature would have to be applied to to legislate further. This legislation further has been done in New York by the

Revised Statutes. Houses may be blown up, or pulled down, to stop a fire, upon order of certain magistrates; and damages are ordered to be paid by the city in such cases, and the mode of ascertaining them is fixed; and in New York not only will the city be made to pay for the houses blown up so, but also for the movables in them, lost through the blowing up of the houses.¹

24 Wendell. The *Mayor et al. of New York v. Pentz*, Court of Errors of New York. Pentz's property was destroyed by order of the Mayor to stop a fire. Property destroyed by authority to stop a fire. Semble, evidence by opinions of witnesses, ruled out in New York, good in Lower Canada. Montreal Corporation Acts allow order to demolish. It is silent as to indemnity or none.

The Chancellor of New York was in favor of making all benefited by the demolition of a house to stop a fire, whether the demolition was upon order of a magistrate, or not, contribute to make up the loss, and pay the owner of the house demolished (as in case of jettison).²

Casaregis, Disc. 46, No. 45, states the case of a ship destroyed in port to save other ships. He asks, would those saved be held bound to pay a kind of salvage?

During a fire, A's house is knocked down to stop the fire running. He can claim contribution from his neighbours. Proudhon, Usuf. Tom. 3, 1594. *Contra* Toullier, vol. xi, No. 180.

In *Bowditch v. City of Boston*,³ buildings were blown up to check the extension of a fire. The chief engineer authorized fire wards A, B, and C to blow up buildings. A was assigned to the ward in which was the building blown up. The Massachusetts statute authorized three fire wards of the city to do so. A board of engineers were the fire wards. When the chief engineer authorized A, only one other engineer was present. The city was not held liable, the statute not having been followed so as to bind it.

¹ Monthly Law Reporter of 1863-4, page 624. Compare with *City Fire Ins. Co. v. Cortice*, ante. Is pulling down worse for the owner of house than firing by explosion?

² The *Mayor et al. of New York v. Lord et al.*, 18 Wendell; p. 314, Sedgwick, 2d. edition.

³ 18 Wendell.

⁴ 11 Albany Law Journal, A. D. 1875.

In June, 1845, a fire occurred in Quebec. The house of a man named Mackenzie was demolished by order of a magistrate. Mackenzie moved in the Queen's Bench, Quebec, for a *mandamus* to compel the city to raise an assessment to indemnify him, but a *mandamus* was refused. Though the Corporation had power to make by-laws, and did make them, authorizing such demolition, the Legislature had not gone further to authorize assessments to pay the loss consequent. Neither Act nor by-law provided for assessment of the damages to owner. A by-law alone could not do it, and the Act of Parliament had not done it.

Chap. 24 of the Consolidated Statutes of Lower Canada (p. 178) allows by-laws to be made by municipalities, to authorize blowing up a building and pulling down of houses to stop a fire.

The statutory liability is not to be extended. Certain officers are authorized by the charter of Buffalo in case of fire to tear down or blow up any *buildings* likely to communicate fire, and the common council is to pay the damage as if the property were taken for public improvement, unless it should appear that the property would have been destroyed by such fire any way. The officers blew up a building, and the shock broke the glass in the house opposite. The city was held not liable for this.¹

In a case in 32 Am. Rep. (published 1880) the fire department of a city destroys a house, so; at common law the city is not liable. If by a statute, the remedy of the statute must be pursued. The city, sued in this case, was freed. The statute remedy alone competed to plaintiff who had not resorted to it.

In Texas is a general incorporation of Cities Act, and a clause allows the engineer and mayor to direct buildings to be demolished or blown up to stop fire, and "no suit to be brought against the city or any person therefor," but on application of owner, assessment of damages to be &c., and city must pay accordingly; and so in *Fisher v. Boston*, 6 Am. Rep. it was held that at common law, destruction of house did not

authorize suit against the city, for the engineers and fire department officers were public officers, and not agents of the city.

At common law anybody or everybody has a right to destroy real property in case of actual necessity to prevent fire spreading, and no responsibility is on the destroyer. So held in Massachusetts. *Semble*, so in old Quebec. The common law so adopts the natural law. Burlamaqui cited, 145, § 6, see p. 620, 32 Am. Rep.

Agnel (p. 87) seems to hold the insurance company liable to pay for houses knocked down by necessity or public authority just as if burned.

Toullier, Tom. xi., No. 181, cited, says: He who caused the fire has to pay for house demolished by authority. Boudousquie, No. 324. Toullier does not treat of insurance company.

The old law upon this point is as follows: A house being destroyed in a large conflagration, to save others, shall those saved pay the owner of the house destroyed? *Labco* says yes. *Ulpian*, law 3, § 7, — de incendio (also *Celsus*) says no. Book 47, title 9, digest.

Rousseau de Lacombe *vo. "Incendie,"* No. 14, says that if the neighbours knock down a house, to stop a fire on a magistrate's order, those whose houses are saved need not pay; and that in no case, even though no order be given by the magistrate, can the owner of a house destroyed to stop the progress of a fire, make others pay him if his house would have been burnt in the fire, had it not been destroyed otherwise. He says law 7, § 4, — *quod vi aut clam*¹ treats of the case, and allows the owner to get indemnity where the neighbours act *ex mero motu*, without magistrate's order.²

The Coutume de Bretagne had an article on the subject; houses saved had to contribute; as by the law *Rhodienne de jactu*, page 205, 2 Fournel.

The following case is to be found in *Journal des Audiences*, folio vol. 1, p. 693: A fire was raging in the town of Mans; six houses had been burnt when the seventh was seized

¹ Albany Law Journal, A. D. 1879, p. 336.

¹ Quod vi &c., is 43rd book of Digest, title 24.

² See J. des Aud. Tom. 2, liv. 1, ch. 17, Arrêt of 1657.

by the fire, but was immediately demolished by order of the Juge Prevôt, whereby other neighbouring houses were saved. The owner of the house demolished claimed a contribution from the neighbours whose houses were saved, and sued one. The judgment of the President of the Town of Mans put the parties *hors de cour*, so dismissing the action, and this judgment was confirmed upon appeal. The appellant claimed to be in a case like that of the law 2 ad legem Rhodiam de jactu, and said he might also invoke the Aquilian law. The respondent succeeded, chiefly because the fire had seized appellant's house before the demolition was ordered; but in the original court, apparently, because the *prevôt* had ordered the demolition.

There is no action against a man for knocking down a neighbouring house in a conflagration, to save his own, if the fire had already reached that neighbouring house; for, if he had not pulled down the house, it would have burned and perished; it was to be lost; so no injury was done by pulling it down.¹

Suppose that during a fire a wall is pulled down by the authorities, or say the house is blown up next to the one in which the fire commenced; no action can be for these things against the man who is to be blamed for his own house catching fire. But if one part of the same house catch fire, and all has to go, explosion or knocking down may be resorted to, and the author of the fire will be chargeable with all the consequences. No. 44, Sourdut.

Rolland de Villargues, *Assurance Terrestre*, No. 95, says that the insurer must pay if the house insured be demolished by lawful authority to cut off a fire.

The man who first causes a fire has to pay all resulting damages, and Toullier, vol. xi., No. 181, says he must pay damages for demolition of a house to cut off a fire, because it is a consequence of his fault, if competent authority have ordered the demolition. This is so as against the author of the fire, in

fault, but is the insurer to pay the owner of the house? Yes! says Rolland de Villargues.

No action of damages lies against a man who hurts *se defendendo*, &c., repelling midnight burglar, &c. In the same class is the man who demolishes a neighbour's house to prevent fire spreading to his own, (*siquidem*) particularly where the fire has already reached the neighbour's house; for he can't be seen to have hurt anybody, the building demolished being bound to go by fire *sine dejectione*, if left alone undemolished. But if it be quite doubtful whether the fire would have reached the house demolished, the demolisher is liable to an action, but not the one *ex lege aquilia*.¹

In France, insurance companies pay for house insured that is demolished to prevent spread of fire, and often agree to do so by express convention.

If my house being insured (in France), the next one not insured be damaged and broken to save mine, this is held *frais de sauvetage*, to be paid by insurance company of my house. Boudousquie; but Pouget is against this.

§ 175. Loss by explosions.

In American policies such a condition as this occurs frequently:

"This company will not be liable for damage by the explosion of a steamboiler, nor for damage by fire resulting from such explosion."

Ordinarily, injuries to property from explosions of boilers are not covered by a fire policy; it is otherwise, however, with damage from explosion of gunpowder in houses insured. This supposes the explosion to be by fire. Shaw (upon Ellis) asks: How would it be if it were produced by lightning? To which it may be answered that lightning does not burn powder, but by fire.

Some policies contain this clause: "*Neither will the company be responsible for loss or damage by explosion, except such loss or damage as shall arise from explosion by gas.*"

In the case of *Stanley v. Western Insurance Co.*,² the plaintiff's business was that of extracting oil from shoddy, which is done in

¹ Voët's summary 28, or sec. 28, title 2, book 9, Pandects ad legem Aquilianam. Onus probandi, sec. 20, see Voët.

¹ Ad legem Aquilianam, lib. ix, tit. 2, Voët, section 28.

² Exchequer, Jan. 1868.

the following manner:—The shoddy is placed in an "extractor," into which is pumped from below bisulphide of carbon; this, rising through the shoddy, disengages the oil, which flows off through a hole at the top of the extractor. The bisulphide is then drawn off, and steam is introduced, which carries off the residue of bisulphide and oil remaining in the extractor into a still, where they are separated. The vapour which thus passes from the extractor would, in chemical terminology, be called a vapour, and not a gas, being condensable at a temperature above 32° (viz 109°); it is highly inflammable, and, when mixed with air in the proportion of one to fifteen, is explosive.

The accident was caused by a leakage in the gaskin (or packing of canvas), which lies between the lid and rim of the extractor, coupled with a stoppage in the pipe between the extractor and the still. The vapour, escaping through the hole, took fire at the lamps, and ignited some matting and bags lying near; and then, becoming sufficiently mixed with air, exploded. The explosion blew off the roof, and blew down part of the walls, and the fire then became general and burned for some time.

The defendants paid £25 into court for the damage done by the fire before the explosion took place, and contended that they were not liable for any further damage, as it did not arise from an explosion of gas within the meaning of the exception in the policy.

The total damage by the explosion and fire was found by the arbitrator, to be £483 16s 6d.—Mr. Quain, Q.C., contended, on the part of the plaintiff, that he was entitled to the whole sum, on the ground that it was a loss by fire within the meaning of the policy; secondly, that if it was not a loss by fire, it was a loss by the explosion of gas within the exception in the policy; and thirdly, that in any case he was entitled to £177 (minus the money paid into court), which the arbitrator had found was the amount of damage caused by the fire both before and after the explosion.

The Court held that the word "gas" applied only to ordinary illuminating coal gas, and did not include the vapour in question;

and, further, held that the defendants were exempted from liability for the damage done by the further fire, which was caused by the explosion; but the heads of damage not being severally found, they remitted the case to the arbitrator.

Loss from breakage by distant explosion, being a loss by concussion, is not covered by ordinary policies.¹

The case of *Taunton v. The Royal Ins. Co.*, which arose out of the explosion of the ship *Lotty Sleigh*, while lying at anchor in the Mersey, raised a question of some importance as to the discretion of directors of an insurance company to make good losses not covered by the policies of insurance.

On the 15th of January, 1864, the *Lotty Sleigh*, then lying at anchor in the Mersey, with a large quantity of gunpowder on board, caught fire and blew up. The concussion of the air produced by the explosion of the gunpowder caused great damage to property for several miles round, and in particular shattered the windows of several houses and manufactories in Liverpool and Birkenhead. Many of the persons whose property was thus injured were insured in the Royal Insurance company. The directors, acting upon what they termed a liberal construction in favour of the insured, had come to the determination to pay all losses consequent on the explosion which had been sustained by parties insured with the company, and had already paid claims for small sums, to the amount of 960*l*. The plaintiff, who was a shareholder in the company, protested against any application of the funds to make good these losses, on the ground that they were not within the terms of the policies, which contained a distinct provision that the company would not "be responsible for any loss or damage by explosion, except for such loss or damage as shall arise from explosion of gas." He accordingly filed the present bill to obtain a declaration that the application of the funds in making good any loss occasioned by the explosion to persons insured against loss or damage by fire was

¹ *Everett v. London Ins. Co.*, Jurist, A.D. 1866, p. 311; 1*b*. A. D. 1866, part 1, p. 546.

² Before the Vice-Chancellor's Court, Feb. 29, 1864.

unauthorized and improper. The bill also prayed an injunction to restrain any such payments, and that the directors might be declared personally liable to make good any payments already made by them.

The directors submitted that although the losses in question were not strictly within the terms of the policies, they had exercised, a wise discretion in at once offering to satisfy the claims as a matter of favour, and not admitting any liability, believing as they did that such a course was much more conducive to the real interests of the company than a narrow-minded adherence to the strict letter of the provisions contained in the policies. They had obtained the concurrence of a majority of the shareholders to the course taken by them, and the principal insurance-offices, such as the Sun, the Phoenix, the Royal Exchange, and the Alliance, had taken the same view, and voluntarily paid the losses occasioned by the explosion. The Vice-Chancellor said that the question was one of considerable importance as to the management of companies of this description. The Court was extremely careful to prevent the application of money intrusted to directors by the shareholders for any other than the legitimate purposes of the business. At the same time it would not be for the benefit of shareholders that those purposes should be impeded or narrowed. Looking at the provision excluding payment for damage occasioned by explosions, except explosions by gas, he was strongly of opinion that the policies would not cover the loss occasioned by the particular accident. The directors themselves thought that they were under no legal liability, but professed to make the payment *ex gratia*, and in order to promote the interests of the company. Could not, then, the whole body of shareholders sanction such a payment? The damage having been occasioned by something analogous to, though not falling within, the risks insured against by the policy, the question was, whether the company were not entitled, by way of preventing any complaint or litigation, to make good these small losses, rather than incur the risk of being damaged in reputation as an illiberal office.

Upon this question the evidence of the mode of carrying on business by companies of this nature was very material. It appeared that other offices were in the habit of acting liberally in respect of claims of this description not falling strictly within the terms of the policies. Looking at the usage in this respect, there was nothing extreme or unreasonable in the conduct of the company in determining that these losses should be paid. He could have very little doubt that the course taken by the directors, and approved by the majority of the shareholders, was conducive to the welfare of the company, and likely materially to promote its interests. Upon the whole, therefore, the plaintiff was not entitled to a decree, and as he had not come here to secure any benefit to the company, the bill must be dismissed with costs.^a

^a Query, as to soundness of this judgment, for the losses might be huge; as in the later case of the explosion at Erith, Sept. 1864.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Sept. 6.

Judicial Abandonments.

Joseph L'Abbé, trader, Quebec, Aug. 29.

A. F. Weipert, trader, Quebec, Sept. 3.

Curators appointed.

Re Amedée Bayard.—P. E. de Lorimier and J. M. Marcotte, Montreal, joint curators, Sept. 2.

Re François Bouchard, general merchant, St. Félixien.—N. Matte, Quebec, curator, Aug. 29.

Re Joseph Cadieux.—D. Parizeau, Montreal, curator, Sept. 1.

Re Philippe A. Donais.—C. Desmarceau, Montreal, curator, Sept. 3.

Re Isaac Harris, Lachine.—Kent & Turcotte, Montreal, joint curators, Sept. 3.

Re W. C. Ravenhill, agent.—Kent & Turcotte, Montreal, joint curators, Sept. 3.

Dividend.

Re Lagrenade, Beauchamp & Co.—First and final dividend, payable Sept. 23, C. Desmarceau, Montreal, curator.

Separation as to Property.

Marie Appoline Angéline Boisseau vs. Alfred Massé, trader, Montreal, Aug. 27.

Bella Naughtigall vs. James Lipsky, trader, Montreal, Aug. 27.

Virginie Richard vs. Joseph Massé, trader, St. Angèle, Aug. 26.

Court Terms altered.

Circuit Court for County of Bromé to be held at Knowlton, 16th and 17th January, March, May, Sept.

Circuit Court, County of Shefford, to be held at Waterloo, 10th, 11th and 12th February, April, June and October.

Circuit Court, County of Missisquoi, to be held at Bedford, 15th and 16th February, April, June and October.

Circuit Court, County of Missisquoi, to be held at Farnham, 18th and 19th January, March, May, and September.

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SUPREME COURT OF CANADA.

OTTAWA, March 10, 1890.

Ontario.]

O'KEEFE v. CURRAN.

*Partnership—Terms of—Breach of conditions—
Expulsion of one partner—Notice—Waiver
—Good-will.*

Partnership articles for a firm of three persons, provided that if any partner was guilty of breaking certain conditions of the terms of partnership, the others could compel him to retire, by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the good-will of the business. One of the partners having broken one of such conditions, the others verbally notified him that he must leave the firm, and to avoid publicity he consented to an immediate dissolution, which was advertised as "a dissolution by mutual consent." After the dissolution, the retiring partner made an assignment of his good-will and interest in the business, and the assignee brought an action against the remaining partners for the value of the same.

Held, reversing the judgment of the court below, Fournier, J., dissenting, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from showing that it took place in consequence of the misconduct of the retiring partner; that such advertisement could not be invoked to support a claim which could have been made if the dissolution had really been by mutual arrangement; that the forfeiture of the good-will was caused by the improper conduct which led to the expulsion of the partner in fault, and not by the mode in which such expulsion was effected: and, therefore, the want of notice, required by the articles, of intention to expel, could not be relied on as taking the retirement out of that provision

of the articles by which the good-will was forfeited.

Appeal allowed with costs.

Christopher Robinson, Q.C., and Moss, Q.C.,
for the appellants.

McCarthy, Q.C., and Worrell for the respondents.

OTTAWA, March 10, 1890.

New Brunswick.]

O'BRIEN v. O'BRIEN.

Partnership—Action by partners—Set off—Dissolution—Notice to defendant.

An action was brought by three partners in the lumbering business for the amounts due from the defendants, for whom they had been getting out lumber during the years 1880, 1881, and 1882, as appeared by the accounts made out by defendant at the end of each year. To this action a set-off was pleaded, the greater part of which was for goods supplied after the year 1882, and the plaintiffs contended that such goods were supplied to one of them only; that the partnership had been previously dissolved, and the other plaintiffs had nothing to do with the dealings connected with the set-off. The issues involved in the action were, first, whether or not the partnership had been dissolved before the goods covered by the set-off were supplied by the defendant. Secondly, if it had been so dissolved, whether or not the defendant had notice of the dissolution.

On the trial, the plaintiffs made a *prima facie* case by proving the accounts of the defendant at the end of each year showing the several balances claimed in the action, and after evidence was taken on the set-off the plaintiffs caused the books of defendant to be produced to show that the goods supplied after 1882 were charged to P.B., whereas during the previous years the charges were to P.B. & Bros., the name of plaintiffs' firm. To rebut this, defendant was allowed, subject to objection, to show that entries had sometimes been made during the existence of the partnership, against P.B., and the judge in charging the jury told them that they could inspect the books and see how they were

kept for both periods, and if there was any difference between the years 1880-83 and the subsequent years.

The jury found the issues in favour of the defendant who obtained a verdict on his set-off. This was affirmed by the full court, subject, however, to the defendant consenting to his verdict being reduced by deduction of an amount as to which the trial judge had certified there was not satisfactory evidence, and unless defendant consented to such reduction a new trial would be ordered. On appeal from this decision to the Supreme Court of Canada:

Held, Strong and Gwynne, JJ., dissenting, that there was no misdirection in the trial judge charging the jury as he did; that the jury having, on the evidence, found the facts in favour of defendant, and their finding having been confirmed by the full court, it should not be disturbed; and that substantial justice was done by the reduction of defendant's damages.

Held, per Gwynne, J., that there should be a new trial; that the evidence from defendant's books which was objected to, should not have been received; and that the course pursued at the trial, and by the learned judge in his charge, seemed based on the assumption that because the plaintiffs had at one time been partners in special transactions, they should be deemed to be partners subsequently in an entirely different business, which assumption was utterly without warrant.

Held also, per Gwynne, J., that the court had no right to compel the defendant to consent to a reduction of damages, as such a course has never been pursued except in an action for unliquidated damages where the sum awarded was considered excessive.

Appeal dismissed with costs.

G. F. Gregory for the appellants.

Gilbert, Q.C., for the respondent.

OTTAWA, March 10, 1890.

New Brunswick.]

SEARS V. CITY OF ST. JOHN.

Lessor and lessee—Covenant for renewal—Option of lessor—Second term—Possession by lessee after expiration of term—Effect of—Specific performance.

A lease for a term of years provided that when the term expired any buildings or improvements erected by the lessees should be valued, and it should be optional with the lessors either to pay for the same or continue the lease for a further term of like duration. After the term expired the lessees remained in possession for some years, when a new indenture was executed which recited the provisions of the original lease, and after a declaration that the lessors had agreed to continue and extend the same for a further term of fourteen years from the end of the term granted thereby at the same rent and under the like covenants, conditions and agreements as were expressed and contained in the said recited indenture of lease, and that the lessees had agreed to accept the same, it proceeded to grant the further term. This last mentioned indenture contained no independent covenant for renewal. After the second term expired the lessees continued in possession and paid rent for one year, when they notified the lessors of their intention to abandon the premises. The lessors refused to accept the surrender and after demand of further rent, and tender for execution of an indenture granting a further term, they brought suit for specific performance of the agreement implied in the original lease for renewal of the second term at their option.

Held, affirming the judgment of the court below, Ritchie, C. J., and Taschereau, J., dissenting, that the lessees were not entitled to a decree for specific performance.

Held, per Gwynne, J., that the provision in the second indenture, granting a renewal under the like covenants, conditions and agreements as were contained in the original lease, did not operate to incorporate in said indenture the clause for renewal in said lease which should have been expressed in an independent covenant.

Per Gwynne, J., Patterson, J., *hesitant*, that assuming the renewal clause was incorporated in the second indenture, the lessees could not be compelled to accept a renewal at the option of the lessors, there being no mutual agreement therefor; if they could, the clause would operate to make

the lease perpetual at the will of the lessors.

Per Gwynne and Patterson, JJ., that the option of the lessors could only be exercised in case there were buildings to be valued erected during the term granted by the instrument containing such clause; and if the second indenture was subject to renewal the clause had no effect, as there were no buildings erected during the second term.

Per Gwynne, J. The renewal clause was inoperative under the statute of frauds which makes leases for three years and upwards, not in writing, to have the effect of estates at will only, and consequently there could be no second term of fourteen years granted except by a second lease executed and signed by the lessors.

Per Ritchie, C. J., and Taschereau, J., that the occupation by the lessees after the term expired must be held to have been under the lease, and to signify an intention on the part of the lessees to accept a renewal for a further term as the lease provided.

Appeal dismissed with costs.

Gilbert, Q. C., and Sturdee for the appellant.
I. Allen Jack for the respondent.

OTTAWA, March 10, 1890.

New Brunswick.]

VAUGHAN V. WOOD.

Dog—Injury committed by—Ownership—Scienter—Evidence for Jury.

W. brought an action for injuries to her daughter committed by a dog owned or harbored by the defendant V. The defence was that V. did not own the dog, and had no knowledge that he was vicious. On the trial it was shown that the dog was formerly owned by a man in V's employ who lived and kept the dog at V's house. When this man went away from the place he left the dog behind with V's son to be kept until sent for, and afterwards the dog lived at the house, going every day to V's place of business with him or his son who assisted in the business. The savage disposition of the dog on two occasions was sworn to, V. being present at one, and his son at the other. V. swore that he knew nothing about the dog being left by the owner with his son until he heard it at the trial. The trial

Judge ordered a nonsuit which was set aside by the full court, and a new trial ordered.

Held, affirming the judgment of the court below, that there was ample evidence for the jury that V. harbored the dog with knowledge of its vicious propensities, and the nonsuit was rightly set aside.

Appeal dismissed with costs.

Weldon, Q. C., for the appellant.

Alward for the respondent.

OTTAWA, June 12, 1890.

New Brunswick.]

FERGUSON V. TROOP.

Lessor and Lessee—Eviction—Entry by lessor to repair—Intent—Suspension of rent—Construction of lease.

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after, except with the consent of the lessee. An action for rent under the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time, without the necessary consent, whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. On the trial, the jury found that no consent had been given by the lessee for such occupation, and that the lessee had no beneficial use of the premises while it lasted.

Held, *per* Taschereau, Gwynne and Patterson, JJ., reversing the judgment of the court below, that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the conduct of the tenant; and there being no limitation of time for the completion of the repairs, the limitation being confined to the entry, and there being evidence that the lessee acquiesced in the occupation by the lessor after the time limited, the plea of eviction was not proved.

Held, *per* Ritchie, C. J., and Strong, J., approving the judgment of the court below, that the jury having negatived consent by the lessee, and having found that the inter-

ference with the enjoyment by the tenant of the premises was of a grave and permanent character, the rent was suspended in consequence thereof.

Held, per Patterson, J., that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving the tenant of the use of a portion, does not necessarily work an eviction; a tenant may be deprived of the beneficial occupation of the premises for part of his term, by an act of the landlord which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction.

Appeal allowed with costs.

Gibbert, Q.C., for the appellant.

Weldon, Q.C., for the respondent.

OTTAWA, June 12, 1890.

Ontario.]

HISLOP v. TOWNSHIP OF MCGILLIVRAY.

Municipality — Duty of — Road allowance — Obligation to open — Substitution in lieu thereof — Jurisdiction of court over municipality — C. S. U. C. c. 54.

H. was owner of, and resided on, a lot in the eighth concession of the Township of McG., and under the provisions of C. S. U. C. c. 54, an allowance was granted by the Township for a road in front of said lot. This road was, however, never opened, owing to the difficulties caused by the formation of the land, and a by-law was passed authorising a new road in substitution thereof. Some years after, H. brought a suit to compel the township to open the original road, or, in the alternative, to provide him with access to his lot, and also to keep said road in repair and pay damages for injuries caused by the road not having been opened.

Held, affirming the judgment of the court below, that the provisions of the Act C. S. U. C. c. 54, requiring a township to maintain and keep in repair roads, etc., and prohibiting the closing or alteration of roads, only applied to roads which had been formally opened and used, and not to those which a township in its discretion has considered it inadvisable to open.

Held also, that the courts of Ontario have no jurisdiction to compel a municipality, at the suit of a private individual, to open an original road allowance and make it fit for public travel.

Appeal dismissed with costs.

R. M. Meredith for the appellant.

W. R. Meredith, Q.C., for the respondent.

OTTAWA, June 12, 1890.

Ontario.]

GRANT v. BRITISH CANADIAN LUMBER CO.

Action for discovery — Possession of company's books — Evidence.

G. was for some time manager of the B. C. L. Co., and his services were dispensed with by written notice which directed him to hand over the books, etc. to a person named. He demanded an audit of the books which was begun and partially finished, and while the books were, presumably, in an office formerly occupied by G. as such manager, he ejected from said office a liquidator of the company, which had become insolvent. In an action against G. to compel him to hand over the books, or make discovery as to where they were, he alleged that they were not in his possession, or under his control. The trial judge held that they had been in his possession when the liquidator was ejected from the office, and that the defence was not made out. He made an order for discovery, and his judgment was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada:

Held, affirming the judgments of the courts below, that the judgment of the trial judge, who saw and heard the witnesses, affirmed as it was by two courts, should not be interfered with, only matters of fact being in issue.

Appeal dismissed with costs.

Hoyles, Q.C., and *Wyld* for the appellant.

W. Cassels, Q.C., and *Gordon* for the respondents.

OTTAWA, June 12, 1890.

Ontario.]

TITUS v. COLVILLE.

Solicitor — Action by — Professional services — Election petition — Evidence — Questions of fact.

T. a solicitor, brought an action for professional services rendered in the conduct of a petition against the return of a member of the legislative assembly of Ontario. The defendants in the action were respectively the President, Secretary and Treasurer of the Liberal Conservative Association of the county returning the member whose election was protested. In his statement of claim, T. alleged that at a meeting of the association when it was determined to protest the return, a resolution was passed appointing him solicitor to carry on the proceedings, and that defendants retained and employed him as such solicitor. The defence to the action was that defendants never retained T. as alleged, but that he had volunteered to act as such in the said proceedings without any remuneration. The action was tried without a jury, and the trial judge found that there was no evidence of any resolution appointing T. solicitor, or of any retainer of T. by defendants as solicitor in said proceedings, and he gave judgment for the defendants. The Divisional Court reversed this judgment holding, that the retainer was proved, but the Court of Appeal, in turn, reversed the judgment of the Divisional Court and restored that of the trial judge. On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the Court of Appeal, that the only matters in issue being matters of fact which were found in favour of defendants by the trial judge who saw and heard the witnesses, and was the most competent person to decide these questions, and his judgment having been affirmed by the court of appeal, it should not be disturbed by this Court.

Appeal dismissed with costs.

F. F. Titus for the appellant.

Northrup for the respondent.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 296.]

A fire being in a house insured, and a gunpowder explosion destroying it, the house

must be paid for by its insurer. But the concussion damaging another house, insured at another company, this company is not to pay, nor the first company either.¹

Cotton in a warehouse was insured, the policy containing an exception against fire by means of invasion, &c., explosion, &c. An explosion took place in another house, and there resulted an extensive conflagration, and the warehouse and cotton were wholly consumed. The fire was not communicated to them directly from the house in which was the explosion, but from another house fired by the fire from the house in which the explosion was. The whole fire was a continuous affair. The insurers were held not liable upon appeal by them.²

The explosion lighted the fire which in a single conflagration destroyed the property insured, yet the fire was the proximate cause of the loss claimed, but the fire was caused by explosion.

§ 176. Conditions against keeping of gunpowder.

"No greater quantity of gunpowder to be allowed in any house or building assured by this company, or the premises connected therewith, than twenty-five pounds; and the keeping any greater quantity than twenty-five pounds shall make this policy void."

Sometimes it is stipulated that "the keeping of gunpowder, for sale, or on storage, upon or in the premises insured, without written permission on the policy, shall render it void."

Semble, under the above conditions the mere keeping avoids.³ A insures his house

¹ 15 Annual Rep. La., A. D. 1860, *Caballero v. Home Mutual Ins. Co.* The proximate cause of the loss only is to be considered. Yet in *Waters v. Merchants Louisville Ins. Co.* 11 Peters, the insurance company was held liable for an explosion.

² December, 1868, Supreme Court of United States, 7 Wallace's R.

³ The condition against keeping gunpowder is violated by keeping half a pound. Goods, groceries, provisions, were insured. The policy to be void if the assured should keep gunpowder without written permission on the policy. In the body of the policy permission was given to keep 25 pounds of gunpowder for retail trade, to be kept in close tin cans and sold by daylight only. On the day preceding the fire the assured's clerk sold half a pound from a wooden keg

subject to the first of the above conditions; afterwards he keeps fifty pounds of gunpowder in it, for a month, up to the time of a general conflagration, when he is seen removing it out of the house. The house is burnt in the general conflagration. The insurers go free. Let the clause read, "so long as, &c.," else the policy is void.

If not over 25 pounds weight of gunpowder be allowed on the premises, say a store insured, or where any goods are insured, the insurance will be void if over 25 pounds be brought into or taken into the store, though it be removed before fire happens to the store.¹

Three adjoining houses were insured by one policy, for a sum on each. By condition in the policy the keeping of gunpowder was to avoid the policy. The houses were let to different tenants. The three houses were injured by an explosion of gunpowder in one of them. Neither the insurers nor the insured knew, previously, of any gunpowder being kept in any of the houses. The insured sued, but the insurers were, rightly enough, held free.²

In April, 1856, Gibb & Ross insured their steamer Tinto for £1,000. The policy of insurance provided that if more than 20 pounds of gunpowder should be on the premises, at the time when any loss should happen, such loss should not be made good. In July, 1856, the boat was destroyed by fire on Lake Ontario. At the time of the fire there were 100 pounds of powder on board the boat, as freight. At the trial, at Quebec, Gibb & Ross offered to prove that it was customary to carry on freight gunpowder in vessels like the Tinto, but the evidence was refused.

Upon a question "At time of the fire was there any quantity of gunpowder on board said steamer, and if so, what weight and quantity?" the jury found "Yes! we find that a package containing a hundred pounds of powder was on board as freight, and which

the owners of the steamer were not precluded by the policy from carrying."

The insurance company moved to reject the last part of the finding, and for hearing on the merits, and their motion was granted on the 1st June, 1859, in the Superior Court, Quebec, and on the merits the Court, finding a quantity of powder contrary to the policy to have been on the boat at the time of the fire, dismissed the plaintiffs' action.

Upon appeal, the Queen's Bench, by a majority of the judges, reversed that judgment; but its judgment was afterwards reversed by judgment of the Privy Council, December, 1862, and the judgment of 1st June, 1859, confirmed.³

McEwan *et al.*, sued on two policies, "on stock in trade of general merchandize, including hazardous, contained in building described." On the policies was endorsed this eighth condition: "Every policy shall be void if there shall at any time be more than 56 pounds weight of gunpowder on the premises, unless specially provided for in the policy." The tenth condition freed the insurers from loss by fire happening from invasion, &c., or "by explosion of gunpowder kept by the insured upon his insured premises," &c. Fifteenth, that the following goods shall be deemed hazardous: "Pitch, gunpowder," &c.

The property insured was destroyed by fire. The insurers refused to pay, on the ground that the insured had more than 56 pounds of gunpowder on their premises at the time of the fire. A replication was filed that the plaintiffs were dealers in gunpowder, that the defendants had notice of that fact, that the stock of a dealer in gunpowder usually consisted of over 56 lbs., and that the gunpowder on the premises was part of plaintiff's general merchandize, etc.

The defendant demurred to the replication. The demurrer was maintained, the Court (in Australia) saying: By the 8th condition, the insurers reserve to determine what quantity of gunpowder, if any, although insured as hazardous, they will permit to be stored in excess of the limited amount. The plaintiff appealed to the Privy Council, "because

where it had been kept. More had been kept in the keg. Held, that the policy was avoided. *Shipman v. Oneco and O. Ins. Co.*, January, 1880, New York Court of Appeals. *Alb. Law Journal* of 1880, p. 154, (1st vol.)

¹ *Kerr's N. Br. Rep.*

² *Williamson v. The Trustees of the Fire Ass. of Philadelphia*, A. D. 1856. *Monthly Law Reporter*.

³ *The Beacon L. & F. A. Co.*, appellants, and *Gibb et al.*, respondents.

the 8th condition did not apply to cases in which hazardous goods were specified, in the policy, as the subjects of insurance. 2nd. Because the 8th condition did not apply to policies effected, not on buildings, but on stock in trade.

The respondent contended that the judgment appealed from was correct, because the undertaking of defendants was conditional, the condition being that there should not be upon the premises at any time, or at all events at the time of the happening of a fire, more than 56 lbs of gunpowder.

The appeal was dismissed.¹

§ 177. Hazardous goods.

The printed part of a policy makes the policy null if any hazardous goods are kept; yet an insurance itself being on a stock of a country store by a policy insuring goods such as usually kept in country stores, the policy was held good on fire happening, though some hazardous goods were kept, but not beyond what is usual in country stores; the written matter was held to control printed.²

But some clauses read to prohibit if not specially provided for. In such a case, in Massachusetts, they hold that generality of mention of a country store stock cannot be held special providing against the written clause against gunpowder.³

§ 178. Loss by Camphene Oil, Spirit Gas, &c.

"This Company will not be answerable for any loss or damage to buildings or the contents of building in which is used or stored Camphene Oil, Spirit Gas, or any other article for light, of which Spirits of Turpentine or Alcohol form a component part, unless the same is specially agreed upon, and set forth in the Policy."

Under such condition, must the camphene etc. be used or stored at the time of the fire? Perhaps. If so, if use have ceased before the fire, insured will recover.

Some policies have a clause so plain that the use of camphene may avoid the policy, though the use of it have ceased long before the fire.

Under some policies, camphene oil is not to be used without special permission of the insurers, and the policy is avoided if use be without such permission. Under such a policy and condition, A may insure his house; afterwards use, without permission, camphene oil, for a week or so; discontinue its use; afterwards his house may burn, and the insurers will go free.¹

In *Stettiner*, respondent v. *Granite I. Co.* appellants,² insurance was upon goods in a building; lighting the premises insured by camphene, "or spirit gas," without written permission on the policy was to "render it void." The premises were afterwards lighted with burning fluid. One witness said that spirit gas and burning fluid were the same; but the Jury found the burning fluid not to be the spirit gas mentioned in the policy. It was held by the Superior Court N.Y., that it was wrong in the judge, at the trial, to hold that the condition in the policy only related to insurance upon buildings, and not to insurance upon goods. Judgment would have been reversed upon this ground, but for the jury's finding that the burning fluid was not spirit gas.

In *Lancaster F. In. Co.*, appellant v. *Lenheim*, (Pennsylv., 1879, 33 Am. R.) a stock of general merchandise was insured, "of all kinds usually kept in a country retail store" "except as hereinafter provided." Then followed that the Co. was to be "exempt from liability for loss where turpentine or benzine were deposited, stored, kept or used without written consent on the policy." The exempting clause was printed; the insurance clause written. The insured kept both turpentine and benzine for sale without such consent. The policy was held void, though those articles might be part of merchandise usually kept in country stores.

¹ *McEwan et al v. Guthridge* (2 Feby. 1880), 13 Moore's P. C. Rep.

² *Pinder v. King's Co. F. In. Co.*, 36 N. Y. Rep.

³ See 18 Alb. L. J. p. 224, as to keeping of hazardous articles, camphene, kerosene, fireworks. Matches even are sometimes prohibited in stores.

¹ Hunt's Merch. Mag. vol. 28., (A.D. 1852) *N. W. A. Co.*, Appellant, and *Mead*, Respondent. *Semble*, such use avoids the policy, though it have been discontinued before the fire.

² 5 Duer's R.

INSOLVENT NOTICES, ETC.*Quebec Official Gazette, Sept. 13.**Judicial Abandonnements.*

Napoléon Rousseau, baker, Quebec, Sept. 10.

Curators appointed.

Re Henrietta Mousseau, milliner, Montreal.—Bilodeau & Renaud, Montreal, joint curator, Sept. 10.

Re J. H. Dubois, Drummondville.—Kent & Turcotte, Montreal, joint curator, Sept. 6.

Re Charles Lemire, l'Assomption.—Bilodeau & Renaud, Montreal, joint curator, Sept. 10.

Re S. Jacques Ornstein, doing business under name of S. Jacques, Montreal.—J. McD. Hains, Montreal, curator, Sept. 6.

Re Louis Robert.—Bilodeau & Renaud, Montreal, joint curator, Sept. 9.

Dividends.

Re Anselme Asselin, St. Joseph d'Alma.—Second and final dividend, payable Sept. 22, D. Aroand, Quebec, curator.

Re E. Beaulieu et al.—First and final dividend, payable Oct. 1, Millier & Griffith, Sherbrooke, joint curator.

Re Bernard Sauvage, St. John's.—Dividend, payable Sept. 25, A. L. Kent, Montreal, curator.

Re Stanislas Gendron.—First and final dividend, payable Oct. 1, Millier & Griffith, Sherbrooke, joint curator.

Re F. A. Lallemand. Dividend, payable Sept. 30, A. W. Stevenson, Montreal, curator.

Re F. X. Lepage, dry goods, Quebec.—Second and final dividend, payable Sept. 29, H. A. Bedard, Quebec, curator.

Re W. E. Potter, Montreal.—Dividend, payable Sept. 25, Kent & Turcotte, Montreal, joint curator.

Re Leandre Proulx.—First and final dividend, payable Oct. 1, Millier & Griffith, Sherbrooke, joint curator.

Re Anthime Robert et al.—First and final dividend, payable Oct. 2, F. Fafard, Upton, curator.

Re "The Hibbard Elec. Mfg. and Supply Co." Montreal.—First dividend, payable, Sept. 30, A. W. Stevenson, Montreal, liquidator.

Separation as to Property.

Domitilde Matte vs. Eusèbe Leclair, laborer, Montreal, Sept. 8.

GENERAL NOTES.

HEADS NOT TO BE MIXED.—Mr. Charles Kemble on entering Brussels found that there was preparation making for an execution that occupied a good deal of attention. Three men were to be executed; but one man was remarkable for having committed almost twenty assassinations—having broken prison, etc., and for being a person of remarkable talent. Mr. Kemble determined to witness the spectacle. Now it is to be remembered that at Brussels they do not (or did not) execute any criminals after a certain hour in the day; and in order not to run too near this hour, the culprits are taken to the block some considerable time beforehand. The two undistinguished rogues were melan-

choly enough; but the notorious one was anything but chap-fallen. He was well dressed, had a good carriage, hummed a popular air, and in all other things exhibited the extreme of self-possession. On his way to the guillotine (or when he arrived there) he said, 'Now, don't mix my head with those fellows'; keep it apart. I would not for the world have it supposed that I had such a rascally look as either of these vagabonds.'

IN THE STOCKS.—Lord Camden, when a barrister, had himself fastened in the stocks on top of a hill, in order to gratify his curiosity on the subject. Being left there by the absent minded friend who had locked him in, he found it impossible to procure his liberation for the greater part of the day. On his entreating a chance passer to release him, the man shook his head and passed on, remarking that of course he was not there for nothing.

WEBSTER.—When Daniel Webster, in attacking the legal proposition of an opponent at the bar, was reminded that he was assailing a dictum of Lord Camden, he turned to the Court, and after paying a tribute to Camden's greatness as a jurist, simply added, 'But may it please your Honor, I differ from Lord Camden.'

PROFESSIONAL FOOTBALL-PLAYERS.—Mr. Everitt, Q.C., had a hard task on Saturday last to try and persuade the Court of Appeal, consisting of Lord Esher and Lord Justice Lindley, to say that Mr. Justice North's refusal to grant an injunction in *Radford v. Campbell*, the football case, was wrong. The plaintiffs, two officers of a football club, claimed an injunction against Campbell, a professional football-player, to restrain him from playing for any other club than their own, in breach of his agreement to play for them, and also to restrain a rival club from employing him. The Court sat beyond the usual hour for rising, and listened with good humoured impatience to the arguments on behalf of the appellants. Lord Esher asked Mr. Everitt what use an injunction would be to his clients if they got it. They would only secure a sulky player who would, his lordship thought, very probably kick their football the wrong way. 'But,' said Mr. Everitt, 'it is a very important question of principle.' 'Principle,' said Lord Esher; 'do you mean to tell me that professional football-players have any principle? I think the game would be much better without them.' The Court agreed with Mr. Justice North that it would be a great advance upon the older decisions to grant an injunction in such a case, and dismissed the appeal.—*Law Journal* (London).

NOT SO EASY.—A heavy appeal case was being argued in the Second Division of the Court of Session by a juvenile but very self-possessed advocate. 'The case,' said this youthful Hortensius, 'turns to a large extent upon the voluminous correspondence which I am about to read to your lordships.' Lord Young, who masters documentary evidence as rapidly as Mr. Justice Kay, interrupted him: 'If you refer to me to the pages of the record, I can soon pick up the relevant parts of the letters for myself.' 'Oh no, my lord,' retorted the young lawyer, 'it is not nearly so easy as all that!' Everybody enjoyed the joke, but no one laughed at it more heartily than Lord Young.

The Legal News.

Vol. XIII. SEPTEMBER 27, 1890. No. 39.

CONVERSATIONS BY TELEPHONE.

The question of the admissibility in evidence of conversations over the telephone is one upon which there are already several decisions, and, owing to the rapid increase of telephonic communication, is of some importance.

Conversations by telephone are like no other communications. For instance, they have been compared to communications made through an interpreter, but, of course, this is grossly inaccurate, for, in the case of a conversation carried on through an interpreter, whatever doubt there may be as to the meaning of the exact words used, there is none as to the identity of the speakers. Again, they have been compared to conversations between blind persons or persons in neighboring rooms, not in sight of each other. This comes nearer to telephonic conversation, with the difference, however, that the voices of the speakers are not altered, as may be the case over the telephone.

While, however, there are obvious limitations to the reception in evidence of telephonic communications, their admission is in many cases necessary, and the law upon the subject may be considered as reasonably well settled.

The first case on the question, so far as we know, was *People v. Ward* (N. Y. Oyer and Terminer, 1885, 3 N. Y. Crim. Rep. 483), where it was held that it was competent for a witness to testify to a conversation over the telephone, and to statements made by the other party thereto, where the witness called said party to the instrument and recognized his voice in response.

It is to be noted in this case that the instrument was a private telephone. The witness Fish testified: "I went to the telephone and rung up Mr. Ward. It was a direct telephone between Grant & Ward's office and the bank. I had conversed with defendant, Ward, hundreds of times over the telephone,

and could recognize his voice very distinctly. I recognized it on this occasion." This was held sufficient to admit testimony of what the defendant Ward said.

In the case of *Wolfe v. Missouri Pacific Ry. Co.* (97 Mo. 473; 10 Am. St. Rep. 331), the court went farther, it being held that when a person places himself in connection with a telephone system through an instrument in his office, he thereby invites communications in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk, in charge of an ordinary shop, would be in relation to the business then carried on, and the fact that the voice at the telephone was not identified does not render the conversation inadmissible.

But the court properly added: The ruling here announced is intended to determine really the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled in each instance to much or little weight in the estimation of the triers of fact, according to their views of its credibility and of the other testimony in support or contradiction of it.

We have always felt doubtful as to whether the court did not go a little too far in this case. It is evident that a clerk in an ordinary shop, in apparent charge thereof, has a somewhat different authority to speak for his employer than an unknown person speaking over a telephone. In each case it is a question of presumptive evidence, but the presumption is very much stronger in the case of the clerk in the store than of the speaker over the telephone. The question as to where is the clerk is absolutely determined; as to where is the speaker over the telephone is only a matter of very great probability.

On the second point, that an identification of the voice of the speaker through the telephone is not necessary to make his declarations admissible, we think the court went to a very great extreme, and we doubt whether this ruling should be followed.

A rather curious case, decided some years before the last one cited (*Sullivan v. Kuykendall*, 82 Ky. 483; 56 Am. Rep. 901), was that

of a conversation which took place, not directly, between the parties over the telephone, but through the operator in charge of a public telephone station. It was held by a divided court that the person who received the message from the operator could state what was told him where there was evidence that the other party did in fact use the telephone at that time. It is evident that the operator could not be expected to remember the conversation. It would seem, however, that this case also goes pretty far, and that the statements of the party who alleges that he receives such a message should be strongly corroborated, at least as to the presence of the other party at the other end of the wire at the time testified.

In a recent case, *Banning v. Banning* (80 Cal. 271; 13 Am. St. Rep. 156), it was held that the fact that a married woman is not personally present before a notary at the time he takes her acknowledgment, through a telephone, she being three or four miles from him, will not vitiate such deed, because, in the absence of fraud, accident or mistake, the certificate of the notary in due form is conclusive of the material facts therein stated.

In this case it was clearly proved that the acknowledgment was made through the telephone.

These appear to be all the decisions so far on the question.—*N. Y. Law Journal*.

ROMANCE OF THE LAW.

If verification of the old saying that "Truth is stranger than Fiction" were needed, it can be found in the account of the extraordinary case of *Pickett v. Lyon* tried at Lewes before Mr. Baron Huddleston and a special jury, on the 13th, 14th and 15th August last. A full report of the case will be found in *The Times* (weekly edition) for 22nd August.

The plaintiff was a "costumier" or lady's dressmaker, and he sued to recover a balance of nearly £900 on a total account for nearly £2,000, for dresses supplied to defendant's wife since their marriage in June, 1888, down to February, 1889, during which period of scarcely nine months, the bills came to over £1,900.

The defendant's wife, who had run away from home, came to London in 1877 at the age of sixteen, and had for many years lived an immoral life. She subsequently assumed the name of "Mrs. Spencer Stanhope," used the crest of that family on her cards and writing paper, lived in fashionable neighbourhoods and pretended to be a widow, receiving money from unknown, but easily imagined sources. She became acquainted in August, 1886, with Captain Warner, a gentleman of large property in Leicestershire, who allowed her, for two or three years, the very large sum of £4,000 annually. She lived with the Captain, when in town, in Belgrave-road as Mrs. Stanhope, he taking the name of Captain Stanhope.

Early in 1888, while in London, she casually made the acquaintance of Lient Lyon, of the Life Guards, then twenty-six years of age, and married him secretly in June the same year, under the name of Fitz-Lyon. He had, after the payment of his regimental and customary expenses, some £500 per annum. She represented to him that she was a woman of ample private means. They took a house in Portland terrace and lived there till September. She desired her husband, for the sake of secrecy, not to call at the house in Belgrave-road, though she herself was in the constant habit of repairing thither to meet Captain Warner, who, however, had no idea till March, 1889, that "Mrs. Stanhope" was married, nor did the husband know of Captain Warner. When she then informed Captain Warner of her marriage, he completely parted from her, giving her £1,000 as a wedding present.

The deluded husband had no idea of this state of affairs, till it was accidentally disclosed to him during the course of an action that had been brought, in April, 1890, by one Bonner, a jeweller, for jewelry supplied to his wife. On receiving this dreadful intelligence from his counsel in the case, the unfortunate man was so shocked that he burst into tears and was removed from the court room. He refused to see his wife and instituted divorce proceedings which are still pending. In the present case the wife actually appeared as a witness on behalf of the costumier, against

her deeply wronged husband, and went so far as to allege that her husband was not only aware all along of her intercourse with Warner, but really sanctioned her visits to him, and knew of her receiving money from him! This incredible statement was repelled by the husband and further negatived by expressions in letters of the witness herself. The learned judge in addressing the jury charged strongly against the plaintiff and made severe strictures upon the conduct of the wife, remarking: "I should have put an end to the case if it had not been that a most frightful accusation has been introduced against Mr. Lyon, which I thought, ought to be submitted to you. For the plaintiff's counsel was not content to put the case upon mere authority. He has charged that this gentleman connived or conspired with his wife to allow her to have intercourse with another man during their married life, and that, therefore, from that bare motive he endorsed or allowed the plaintiff to give her credit. That is a frightful issue."

The jury retired, about 3 o'clock, to consider their verdict, one of them observing (as was understood) that all but one were agreed for a verdict in the defendant's favour. This juryman still proving obdurate, they were discharged by the learned judge, on their coming into court at 10 minutes past 7, and judgment was by his direction entered in favour of the defendant husband, with costs. Explaining his action in taking this unusual step the judge remarked that at the close of the plaintiff's case the Solicitor-General had requested him to rule that there was no case to go to the jury. He intimated his opinion pretty strongly that there was not, but did not say then what ought to be done in that connection, and with a view of giving the jury an opportunity of indicating, still further, Mr. Lyon's character, he left the matter to them. When, however, they were discharged without a verdict, in furtherance of the repeated request of the Solicitor-General, he gave judgment for the defendant with costs as above stated. So ends a very sad case which, says *The Times*, is "one of the most extraordinary, perhaps, that ever came before a court of law," and concerning which the learned judge remarked "We have here

the history of the modern Aspasia."—*Western Law Times*.

COUR DE MAGISTRAT.

MONTRÉAL, 23 mars 1889.

Coram CHAMPAGNE, J. C. M.

TURGEON v. DELORME

Transport de créances—Signification—Droit d'action.

JUGÉ :—*Qu'il n'y a pas de lien de droit entre le demandeur et le défendeur si le transport n'a pas été signifié avant l'action ; et que la signification de l'action ne tient pas lieu de signification du transport.*

Ce jugement fut rendu conformément à la jurisprudence établie par la Cour d'Appel, à Montréal, dans *Proulx & Nicholson*, M. L. R., 5 Q. B. 151.

P. U. Renaud, avocat du demandeur.

Préfontaine, St-Jean & Gouin, avocats du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, 22 juin 1889.

Coram CHAMPAGNE, J.

GRANGER et al. v. DAVID.

Billets de concert—Vente—Agent—Reddition de compte.

JUGÉ :—*Qu'une personne qui se charge de vendre des billets de concert pour un autre, et en reçoit une certaine quantité, doit en rendre compte, soit en en remettant la valeur en argent ou les billets mêmes non vendus à moins de perte de ces derniers par force majeure.*

Les demandeurs poursuivent le défendeur sur un compte. Le défendeur admet le compte et offre en compensation jusqu'au montant de \$2.25, la valeur de billets de concert que les demandeurs se seraient chargés de vendre pour lui, à son profit, et qu'ils n'ont pas vendu et qu'ils ne lui ont pas remis. La balance du compte ayant été offerte avant l'action, il renouvelle ses offres avec consignation.

Le jugement fut rendu suivant les offres ; les demandeurs ayant accepté du défendeur des billets à vendre pour un concert devaient

lés lui remettre dans le cas où ils n'ont pas été vendus, à moins d'établir que ces billets sont disparus par force majeure.

Jugement pour le défendeur.

P. B. Laviolette, avocat des demandeurs.

Loranger & Beaudin, avocats du défendeur.

(J. J. B.)

SUPERIOR COURT—MONTREAL.*

Capias—Affidavit—Réponse en droit.

Jugé :—Que dans une requête en contestation d'un *capias*, le requérant ne peut invoquer que des moyens se rapportant à la fausseté ou à l'illégalité de l'affidavit, mais non ceux qui ont rapport à l'irrégularité de l'émanation du bref.—*Chaput et al. v. Porcheron, Taschereau, J.*, 13 mai 1890.

Opposition—Contestation en droit—Réponse en fait—Motion.

Jugé :—Que l'on ne peut répondre par des questions de faits à une défense en droit en contestation d'une opposition, et que semblable réponse en fait pourra être renvoyée sur motion.—*Ewart v. Wyatt, Mathieu, J.*, 29 mai 1890.

Déclaration de paternité—Jurisdiction—Aliments—Administrateur.

Jugé :—Que l'obligation alimentaire est purement personnelle, et que les dispositions de l'article 34 C.P.C. n'y sont pas applicables; de sorte qu'un fils naturel ne peut poursuivre l'administrateur de la succession de son père, nommé et domicilié dans la Province d'Ontario, en déclaration de paternité et pour pension alimentaire; parce que son prétendu père avait, avant sa mort, son domicile dans le district de Montréal, où sa succession se serait ouverte; la Cour Supérieure dans ce dernier district n'ayant pas juridiction.—*Dion v. Gervan, Ouimet, J.*, 30 mai 1890.

Billet promissoire—Endosseur—Protêt—Notaire—Prête-nom—Délai.

Jugé :—1o. Qu'un notaire qui est un des endosseurs sur un billet promissoire n'a pas le droit d'instrumenter comme notaire, pour

protester le billet, quand même étant le porteur de ce billet, il aurait effacé son nom et l'aurait transporté à un prête-nom à la requête duquel se ferait le dit protêt; un pareil protêt est nul, et les endosseurs sont déchargés;

2o. Qu'en loi, un endosseur porteur d'un billet, qui accorde du délai au faiseur, sans le consentement des autres endosseurs, perd son recours contre ces endosseurs, lesquels se trouvent déchargés.—*Pelletier v. Brousseau, Ouimet, J.*, 30 mai 1890.

Charte de la Cité de Montréal—Amendes—Action qui tam.

Jugé :—1o. Que d'après la Charte de la Cité de Montréal, en force depuis le 21 mars 1889, les poursuites pour le recouvrement des amendes ou pénalités imposées par la Charte doivent être portées devant la Cour du Recorder, qui seule a juridiction;

2o. Que ces actions doivent en outre être intentées par la Cité de Montréal, qui seule doit en bénéficier en entier, et ne peut l'être par des actions *qui tam* ordinaires.—*Davichy v. Hurteau, Taschereau, J.*, 8 mai 1890.

Corporation municipale—Poursuite en dommages—Avis.

Jugé :—Que l'on ne peut poursuivre en dommages une corporation municipale soumise au Code Municipal, pour défaut d'entretien des chemins ou cours d'eau, sans lui avoir donné un avis de quinze jours (C.M. arts. 793 et 878); l'avis est nécessaire même dans le cas où dans une action d'une autre nature, le demandeur joint à son action une demande de dommages.—*Senécal v. Corporation de la paroisse de St. Bruno, Taschereau, J.*, 14 mai 1890.

Shérif—Vente de meubles et immeubles—Opposition—Art. 554, C.P.C.

Jugé :—Que lorsque le shérif a saisi les meubles d'un défendeur, et que l'épouse de ce dernier a fait une opposition afin de distraire réclamant les meubles comme sa propriété, en vertu de son contrat de mariage, rien n'empêche le dit shérif de saisir et de procéder à la vente des immeubles du défendeur nonobstant l'article 554 C.P.C.—*Parsons v. Berthelet, Mathieu, J.*, 23 mai 1890.

* To appear in Montreal Law Reports, 6 S.C.

**Diffamation—Défense—Aggravation d'offense—
Rumeurs publiques—Réponse en droit.**

Jugé :—Que dans une action en dommage pour diffamation de caractère, dans laquelle la demanderesse se plaint que la défenderesse a fait circuler dans sa paroisse de calomnies propres à la ruiner dans son honneur et sa réputation, la défenderesse peut plaider que les accusations incriminées avaient notoirement cours dans la dite paroisse, et étaient répétées publiquement par diverses personnes, une réponse en droit à cette partie de la défense sera renvoyée.—*Robert v. de Montigny*, Loranger, J., 31 mai 1890.

Assignment—Huissier—Différents districts.

Jugé :—Qu'un bref doit être exécuté par l'huissier auquel il est adressé; qu'ainsi un bref adressé à aucun des huissiers du district de Joliette, ne peut être exécuté par un huissier du district de Montréal, à Joliette, district de Joliette. — *Laforce v. Landry*, Mathieu, J., 29 mai 1890.

Carte-postale—Injures—Dommages exemplaires.

Jugé :—Que l'envoi d'une carte-postale avec les mots suivants écrits dessus : "*Received the amount all right—nicely caught in your own trap—honesty is the best policy—your confidence games will work no more—you do not need a diploma—rest on your laurels, deeds go further than words—though your words of Saturday and Monday were strong enough. Au revoir,*" est une injure; et que, en l'absence d'aucun dommage réel, le défendeur doit être condamné à des dommages exemplaires. \$40.00 de dommages accordées.—*O'Brien v. Semple*, Mathieu, J., 30 mai 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 303.]

The reporter disapproves of this ruling and he cites several cases, one the *Phoenix Ins. Co. v. Taylor* in Minnesota. The insurance was "on a stock of goods consisting of a general assortment of dry goods, groceries,

crockery and such goods as are usually kept in a general retail store." By a printed clause keeping of gunpowder was prohibited "unless consented to in writing on the policy."

It was held that the writing controlled the printing, and that the written words would authorize the gunpowder, it being proved that it was usually kept in general retail stores. Angell § 14, 15 cited.

In a case of *Morre v. Buffalo F. & Mar. Ins. Co.*, in Wisconsin,¹ the insurance was on a steamer, the policy to be null if camphene, naphtha, benzole, benzine, crude or refined coal or earth oils were used on the premises without written consent. Kerosene oil was used to light the cabin and saloon, and the insurers were condemned though kerosene was admitted to be refined coal or earth oil.

A man insures a building used as a distillery, but says that all distilling shall cease in ten days. He carries it on for thirty days; then a fire occurred afterwards. The insurance company was freed from liability.²

Ch. J. Abbott's (Lord Tenterden) judgment in *Weir v. Aberdeen*³ seems not to be approved by Story, J., in *McLanahan v. Univ. I. Co.*,⁴ but is approved seemingly by Kent, Com: Vol. III. [289]. Kent says Lord Tenterden's argument is "very weighty" to the effect that a "defect cured before a loss, subsequent loss recoverable." (In marine insurance where ship was unseaworthy at first.)⁵

Ch. J. Abbott supposes two anchors to be required, the vessel sails with only one. Before the loss it has gotten a second. The loss happening later, the insurers shall pay, he says.

But Story seems to say no, in 1 Peters, 1b. Wherein does this case differ from one of a vessel said on face of the policy to sail with 50 men; but sailing with only 46? There was breach of warranty; though it get four a month afterwards and before loss, the insurers are free. *DeHahn v. Hartly*. "Proper

¹ 11 Am. Rep.

² Cassation, 5 Feby., 1856. Nullity was held even as to movables therein.

³ 2 Barn. & Ald.

⁴ 1 Peter's R.

⁵ The contrary was judged in the privy council in a case from Quebec, 1809.

manning" is even an implied warranty, says Marshall.

In *Weir v. Aberdeen*, the underwriters were held to have been aware of things, and to have assented to the vessel's putting back, and so were condemned. It really was not a decision contrary to *Forshaw v. Chabert*¹ in which last case the underwriters were freed, though the loss of the vessel was after all that had been wrong was rectified. A ship was sent out unseaworthy, and put into a port and was made seaworthy, and afterwards was lost.

§ 179. *Loss by negligent deposit of ashes.*

"This Company will not be liable for any damage caused by fire originating from depositing ashes or embers in wooden vessels."

Losses by negligence of servants or tenants, must generally be paid by the insurers, but if, in the face of a condition such as above, fire happen by violation of the condition, the insurers will be free.

Even without such a condition, gross personal negligence of the insured or his servants may amount to fraud, and the insurers in such case will go free; if for instance the insured's servants be in the habit of depositing ashes in wooden vessels in a stable adjoining the insured's house insured, and the insured be notified of the fact, and asked to prevent such conduct, but does not, and the stable catch fire and communicate fire to the house insured, the insurer may be freed.

Suppose a policy for 12 months, renewable by annual payments of premium, that obliged the insured to conform to all regulations of police, and he having introduced a furnace, to heat his house, had not gotten it certificated, if fire happened from any cause whatever, *semble*, the insurer would be free. But if after the insured had got it certificated, a renewal premium be taken by the insurer and a fire later happen, *semble* the insurer, would be liable, and not to say that the policy once was void for a time of no certificate.

Suppose a condition to forbid entering a stable at night with a lighted candle. Though

no mischief has ensued, the policy is vacated by entering the stable at night with a lighted candle. There was a possibility of causing a conflagration. [262] Vattel by Chitty. But *Alauzet* says that in *assurance terrestre* it is not as in marine insurance, where a deviation once made, the policy is avoided. He would not be free if fire happened in a general conflagration for instance, not from the lighted candle.

Parsons favors *Alauzet*.—Parsons on Contracts—Conditions—Introduction. He says there is a difference where one is bound to do a thing actively before the other shall be bound to pay. But query? If a man say, you to pay me, but not if I do a thing, (passively even) or allow a condition of things stated, surely the man ought to be bound.

If a condition order the insured to comply with police or city regulations as to sweeping of chimneys, if he do not comply, and fire take from a chimney, the insurer is free. If the condition be that chimneys shall all be swept once a month, default on the part of the insured will free the insurers. If the condition read that the insured shall observe the police regulations as to sweeping of chimneys, and these order sweeping once a month, it is the same thing.

§ 180. *Fires resulting from hurricanes, earthquakes, and burning of forests.*

Some companies except fires resulting from hurricanes, earthquakes, and burning of the forests, or from fire set for clearing lands.¹

Shaw, upon *Ellis*, says: "In order to bring a loss within the protection of a fire policy, it must appear that fire was its *proximate*, or rather its *efficient* cause, and not merely incidental to it."²

If he mean that the falling of a mill, and fire afterwards happening in it from displacement of the stoves, would give no action to the insured, he is wrong. Suppose a fire to take place from the falling of a building having stoves in it. The insurer must pay. The amount of loss is another question, and

¹ See *Gilman v. The Queen*, at Cornwall, Oct., 1871.

² In concussion, by explosion of gunpowder far off, fire is not the proximate cause of loss.

where only goods are insured, the question might be different, as to their value, from what would be the question of the value of the fallen house.

If companies wish to avoid such losses, let them stipulate against them as against losses from hurricanes, etc.

A church takes fire; its steeple, burning, falls on a house and damages it. This house is insured; the owner of it must recover against his insurer.

So of a factory, the chimney of which might so fall.¹

A brick building is insured; it falls; all is ruin. Immediately a fire takes place in the ruins. The insurance company is freed.²

A collision of steamers took place, followed by a fire almost immediately. The insurance company was held liable.³ So fire may be the result of a flood.

In the case of *Commercial Union Ass. Co. v. The Canada Iron Mining & Manufacturing Co.*,⁴ the policy contained a condition against loss by fire, by earthquakes, or by *burning of forests*. During the existence of any of the contingencies aforesaid, the policy to be suspended. The forests in the neighborhood were burning at the time of the loss; so the company was freed. The original Court held that it had not been proved that the buildings insured were destroyed by forest fire, so it condemned the insurance company. The Queen's Bench reversed, and dismissed the plaintiff's action.

§181. *Damage caused by mismanagement of furnaces, etc.*

The insurers sometimes stipulate not to be answerable for loss or damage on stock of any kind, occasioned by misapplication of fire heat in manufactories, or for loss or damage by natural heating of hay, corn, or goods of other kinds.

Damage (from mismanagement of regula-

tors or furnaces) by heat alone, without *ignition*, even where there is no express provision, is not covered by the ordinary policy against loss or damage by fire; *a fortiori*, where the above stipulation is introduced, and the *misapplication of fire heat* occasions ignition, the insurers will not be liable.¹

But a policy would have to be very special to work to prevent an insured recovering loss caused to his goods by mere fire heat, if these goods were damaged, in his house, from a fire burning down his neighbour's, adjoining his. It is going too far to say, as some do, that the loss must not be by mere heat, without ignition. There are cases in which no ignition may be on the insured premises, yet damage may be done to goods in them by fire heat, for which the insurer, under the usual policy, would be liable.

If a house opposite mine be burning, and mine be singed, and threatened, the insurers must pay the damage by heat. And if water be thrown into my house then and there, to prevent fire seizing it, the company is to pay.

Art. 2581 of the Civil Code of Lower Canada says that the insurer is not liable for losses caused merely by excessive heat in a furnace stove, or other usual means of communicating warmth, when there is no actual burning or ignition of the thing insured.

§182. *Goods held in trust or on commission.*

"Goods held in trust or on commission must be assured as such, otherwise this policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured."²

Goods were insured by R., which he had taken in pawn; he insured them as his. They were lost by fire, and it was held that the insured could not recover for them, not having declared as the condition required.³

¹ *Johnston v. West of Scotland Ins. Co.*, Bell's Illustrations, Vol. 1.

² *Nave et al. v. Home Mut. Ins. Co.* Missouri, 1806. Bennett, p. 88.

³ *German Ins. Co. v. Sherlock*. Ohio, A.D. 1874. Bennett, p. 564.

⁴ 18 L. C. Jurist, Queen's Bench, Montreal, A.D., 1873.

¹ *Austin v. Drevie*, 6 Taunt.

² See ante, who may insure? In *Waters v. The Monarch L. & F. I. Co.*, it was decided that, held in trust means in any way in trust, directly or indirectly.

³ *Rafel v. Nashville M. & F. Ins. Co.*, La. Annual Rep. of 1852.

Where an insurance is taken for the benefit of another than the party effecting the insurance, extrinsic evidence may be resorted to for the purpose of ascertaining the interests intended to be covered.¹

In the case of *North British Mercantile Ins. Co. v. Moffatt et al.*, a policy was issued covering "merchandize (the assured's own), in trust or on commission, for which the assured are responsible," in or on certain warehouses, wharves, &c., of which Beal's wharf was one. Certain chests of tea were destroyed by fire at Beal's wharf. The teas had been deposited in bond by the importers with the wharfinger, who issued warrants for them. *Moffatt et al.* had bought the teas from the importer, who endorsed the warrants to *Moffatt et al.* in blank. *Moffatt et al.* had resold the teas in lots, and been paid for them. They held the warrants, however, but for their customers. Fire happened. The insurance company paid what *Moffatt et al.* claimed, it being agreed that they might sue to recover it back, on the ground that they were not liable. The Common Pleas held plaintiffs to be right, and that at the time of the fire the teas were no longer at the risk of *Moffatt et al.*; the teas were not within the words of the policy, "in trust or on commission, for which they are responsible." Judgment went for plaintiff.²

¹ *Lee et al., Respds., v. Adrit et al., Appls.*, 10 Tiffany, N.Y. The policy contained a clause: "property held in trust or on commission must be insured as such, otherwise the policy will not cover such property." L. & H. were paid in full for their loss, but would not admit A. & Co. to participate, though A. & Co. declared, after the fire, to approve all policies taken by L. & H. It was proved that before the fire A. & Co. had in conversation admitted that their stuff with L. & H. was at their own risk at their agents. A. & Co. were sued in *assumpsit* on account, and were condemned in favor of L. & H., who wished to get some insurance money. 10 Tiffany's Rep., p. 89. It is not sufficient, in such cases, that the owners had an interest to which such an insurance might extend. It must be shown that the owner was the one for whom the insurance was, in fact, intended. Extrinsic evidence may be resorted to, to show what interests were, in fact, meant to be insured. Duer, 9th Lect. cited.

² Common Pleas, Nov., 1871.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Sept. 20.

Judicial Abandonments.

Robert G. Berry, veterinary surgeon, Sherbrooke, Sept. 16.

Dame Marie Goyette, doing business under name of Dame Louis Baril & Cie., Iberville, Sept. 11.

George H. Gauvreau, dry goods, Montreal, Sept. 17.

Curators appointed.

Re France Binotte, carriage-maker, St. Ferdinand d'Halifax.—J. E. Méthot, Arthabaskaville, curator, Sept. 15.

Re Wm. Donahue & Co., wholesale grocers, Montreal.—A. L. Kent and A. W. Stevenson, Montreal, joint curators, Sept. 18.

Re Emery Lacasse, plumber.—Bilodeau & Renaud, Montreal, joint curator, Sept. 15.

Re Joseph L'Abbé, trader, Quebec.—H. A. Bedard, Quebec, curator, Sept. 15.

Re Albert Manseau.—C. Desmariseau, Montreal, curator, Sept. 11.

Re James Roberts.—C. Desmariseau, Montreal, curator, Sept. 12.

Re A. F. Weipert & Co., traders, Quebec.—H. A. Bedard, Quebec, curator, Sept. 17.

Dividends.

Re A. Barré, trader, l'Ange Gardien.—First and final dividend, payable Oct. 10, J. Morin, St. Hyacinthe, curator.

Re A. Hubert Bernard, trader, St. Jean, Isle d'Orléans.—First and final dividend, payable Oct. 6, H. A. Bedard, Quebec, curator.

Re Thos. Gédéon Chenevert, St. Cuthbert.—First and final dividend, payable Oct. 6, A. Lamarche, Montreal, curator.

Re Auguste D'Anjou, trader, St. Mathieu.—First dividend, payable Oct. 6, H. A. Belard, Quebec, curator.

Re P. E. Fugère, grocer.—First and final dividend, payable Sept. 26, Bilodeau & Bedard, Montreal, joint curator.

Re Wm. Gariépy, Montreal.—Dividend, payable Oct. 10, J. Frigon, Montreal, curator.

Re J. P. Perrault, trader, Ste. Anne de la Pêrade.—First and final dividend, payable Oct. 6, H. A. Bedard, Quebec, curator.

Separation as to Property.

Marie Léa Bessette vs. Xénophile Barbeau, Montreal, Sept. 12.

Marie Lacouture vs. Bruno Mongeon, N.P., Montreal, Sept.

Appointments.

Louis Rainville and Henri Laurier, of Arthabaskaville, to be joint prothonotary of the Superior Court, Clerk of the Circuit Court, Clerk of the Crown, Clerk of the Peace and of the Sessions of the Peace for the district of Arthabaska.

The Legal News.

Vol. XIII. OCTOBER 4, 1890. No. 40.

The September Term of the Court of Queen's Bench, at Montreal, commenced with 96 appeals on the list. This was a slight increase on the September list of last year, when the number was 87. That the list has remained pretty nearly a fixed quantity for some years, is apparent from the following:—

Sept. 1882.....107	Sept. 1886.....109
" 1883.....106	" 1887.....89
" 1884.....84	" 1888.....84
" 1885.....98	" 1889.....87

Considerable progress was made during the twelve days of the September Term, the Court rising with 31 *délibérés*, besides two cases in which judgment was rendered a few days after the hearing.

The trial of Birchall, for the murder of young Benwell, which terminated at Woodstock on Monday last in the conviction of the prisoner, seems to be one of those cases where circumstantial evidence is as convincing as the most direct testimony. Birchall was traced, in company with the deceased, to the scene of the crime, and it was proved that he had come away alone. Before the identification of the body, he was busy carrying out his scheme to defraud the deceased's father, and thus disclosed the motive of the crime very clearly. The cutting out of the marks on the clothing of the deceased, was an operation which showed great coolness, and was nearly successful in destroying the chance of identification; but the act turned strongly against the accused, (who alone had an interest in preventing the identification) when the finding of a cigar holder inscribed with Benwell's name, in the snow, ten days later, put the police upon the right track. The chain of evidence was so complete, that the ingenuity of Birchall's counsel was unable to make any impression upon it, and the jury, like every one else who has followed the developments of the trial, had no hesitation in coming to the conclusion that the accused

was guilty. He himself preserved a discreet silence as to his movements on the day of the murder, it being impossible to offer any explanation, of which the falsity would not have been immediately apparent.

On the subject of dog law, the *Law Journal* (London) has the following:—"It was a Scottish judge who remarked that every dog was entitled at common law to at least one worry. This *dictum* may have been considered witty at the time, assuming that its flavor was appreciated, but when the joke is handed down by one generation of judges to another, as a rule of law modified (so far as cattle are concerned) by statute, we think it is time to protest. The true principle on which the liability of the owner of a domestic animal for mischief done by such animal is ascertainable, may be shortly stated. Domestic animals are presumed to have inherited or acquired, good manners, and to be thoroughly under the control of their owners and keepers. This presumption is not always justified by the facts. Whenever, in case of injury by a domestic animal, it can be proved (1) that the animal is, in fact, of a fierce or mischievous disposition, and (2) that such fact was known to the animal's owner or keeper at the time of the alleged injury, the cause of action against the owner is complete. The gist of the action is the *scienter*. It is not unlawful to keep a mischievous horse or dog; but one who keeps it with knowledge of its mischievous propensities, keeps it at his peril, and is liable for the consequences of its misbehavior. The fact that it has kicked, or bitten, or gored, or attempted to kick, or bite, or gore, some person or animal (not cattle) on a previous occasion, is some evidence of a vicious disposition, but it is not conclusive. But a plaintiff's inability to prove a particular act indicative of ferocity, is by no means fatal to his case. An animal may have earned an evil reputation by reason of its mischievous propensities, although the plaintiff is not in a position to call witnesses to prove any overt act before the one by which he has been injured. If the owner is proved to have had notice of his animal's reputation, and the plaintiff is proved to have been wantonly attacked and injured, there is a *prima*

facie case for the owner to answer." In this province however, "the first bite" is not admitted as a defence to an action for injury done by a dog, however good its reputation may have been previously.

COUR DE CIRCUIT.

MONTRÉAL, 21 février 1890.

Coram CARON, J.

MOORE v. WALLACE.

Droit de rétention—Pension et logement.

JUGÉ :—1o. *Qu'un maître de pension peut, après trois mois, faire vendre les effets de son pensionnaire pour ce qu'il doit de pension.*

2o. *Qu'il a ce droit, indépendamment de tout autre recours judiciaire.*

Wm. A. Moore, par voie de saisie-revendication, fit entiercer à la fin de janvier dernier (1890), des hardes et effets de toilette qu'il évalua à \$91.50, et qui se trouvaient en la possession de Wm. Wallace, un maître de maison de pension.

Wallace, par sa défense, admit la propriété et ne contesta pas la valeur des effets revendiqués. Il alléguait en outre, que Moore, lui devant un compte de pension, il avait un droit de rétention sur ses bagages et effets.

Moore répondit spécialement, qu'ayant cessé de pensionner chez Wallace plus de trois mois avant l'émanation du bref de saisie-revendication, et Wallace, n'ayant pas fait vendre par encan public les effets saisis dans ces trois mois, ce dernier avait perdu son privilège et le droit de rétention. Il prétendit en outre, à l'argument, que Wallace avait forfait à son droit de rétention en le poursuivant.

PER CURIAM.—Le maître de maison de pension, à défaut de paiement pendant trois mois, a droit de faire vendre par encan public les effets et bagages de son pensionnaire en suivant les formalités prescrites par l'art. 1816a C. C. Son droit de faire vendre par encan public ne naît donc qu'à l'expiration des trois mois, et Wallace n'a nullement forfait à son droit de rétention en poursuivant Moore avant l'expiration des trois mois, car l'article déjà cité lui donne le droit de faire vendre par encan public en outre de tout au-

tre recours; conséquemment l'action prise par Wallace en recouvrement de la pension due par Moore ne lui est préjudiciable en rien du tout.

Saisie-revendication renvoyée.

L. N. Demers, avocat du demandeur.

Lavallée & Lavallée, avocats du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, 10 février 1890.

Coram CHAMPAGNE, J. C. M.

DECARY v. LAFLEUR, & c. *contra.*

Bail—Résiliation—Mise en demeure—Preuve.

JUGÉ :—1o. *Que le locateur n'est responsable des dommages encourus par le mauvais état des lieux qu'après avoir été régulièrement mis en demeure d'y faire les réparations nécessaires ;*

2o. *Que cette mise en demeure peut être verbale, même dans le cas d'un bail écrit, pourvu qu'elle puisse être prouvée légalement, soit par un commencement de preuve par écrit ou par aveu ;*

3o. *Que le locataire qui n'a pas quitté les lieux, avant de demander la résiliation du bail, doit assigner son locateur pour le faire condamner à faire les réparations nécessaires ou voir résilier le bail.*

PER CURIAM.—Le demandeur réclame trois mois de loyer en vertu d'un bail écrit pour un an.

Le défendeur plaide que par suite du mauvais état des lieux loués et la négligence du demandeur de les réparer, bien que mis en demeure de le faire, il a souffert des dommages considérables qu'il offre en compensation pour autant que comporte l'action, puis il prend une demande incidente pour la balance de ses dommages, et demande, en outre, la résiliation du bail.

Le demandeur ne peut être tenu des dommages qu'après une mise en demeure de réparer les lieux. Mais cette mise en demeure, même dans un bail écrit, peut être verbale, pourvu qu'elle puisse être prouvée légalement soit par l'aveu de la partie ou par témoin avec un commencement de preuve par écrit. Dans le cas actuel, la mise en demeure est suffisamment prouvée, la preuve verbale

étant admissible par suite des aveux du demandeur.

Les dommages encourus par la faute du demandeur en privant le défendeur de jouir des lieux loués au désir du bail sont suffisants pour compenser la demande, mais pas au-delà. La demande incidente est donc mal fondée; et avant de demander la résiliation du bail, le demandeur incident aurait dû assigner son locateur pour le faire condamner à réparer ou voir résilier le bail.

Action et demande incidente déboutées.

Autorités.—C. C. 1070, 1067; 1 R. de L. 348; Lorrain, p. 55, No. 367; *Boulanget & Doutre*; *Marchand & Caty*, voir Lorrain, 57.

Prefontaine, St-Jean & Gouin, avocats du demandeur.

Augé & Lafortune, avocats du défendeur.
(J. J. B.)

DECISIONS AT QUEBEC.*

Contract—Arbitration—Engineer's certificate—Submission—Interest—Art. 1077, C.C.

Action for \$184,241, alleged balance of contract price, and value of various works and materials executed, performed and furnished by respondents for appellants. Plea, that by the contract certain powers were conferred on appellants' engineers, who had determined all points in dispute by their final certificate, and established the balance due at \$52,011, for which a confession of judgment was tendered.

The respondents (plaintiffs) prayed that the certificate be rejected and set aside as false and contrary to the agreement and to truth, to the knowledge of defendants and their engineers, and fraudulent and partial, and that the engineers be declared, by reason of alleged personal pecuniary interest, disqualified and incompetent to pronounce between the parties on the matters in dispute, or to grant a final certificate binding on the plaintiffs.

The contract contained the following stipulations: "All the accounts relating to this contract between the commissioners and the

contractors must be submitted to and adjusted and settled by the engineers, and their certificate, fixing the balance due to the contractors on the completion of the works, shall be conclusive and binding on both parties without any appeal.... Should any dispute arise as to the true meaning and intent of the said specifications, bills of quantities, etc., or as to the quality of materials, etc., or the due and proper execution and maintenance of the works, as to liquidated damages for non-completion of the works within the contract time, or rate of progress, or as to the measurement or valuation of the works executed, or as to alterations, deviations, additions, etc., or as to any claim.... for work extra, or as to the value of any work for which the prices in the schedule do not apply, or as to accidents, damages, contingencies, or any other matter or thing whatsoever arising out of the contract, the same shall be decided by the engineers as sole arbitrators, and their decision shall be final and binding upon the commissioners and contractors absolutely, and the commissioners and contractors shall be bound to implement and fulfil such decision.... And it is hereby understood and agreed.... that in the event of any difference of opinion arising between the engineers and the contractors regarding the interpretation to be given to any clause or matter contained in the said supplementary tender, the same shall be decided by the said engineers."

Held, that the above stipulations and agreements, having been voluntarily entered into, were legal and binding on the parties, and in the absence of proof of fraud or collusion between the appellants and the engineers, the certificate of the latter could not be set aside.

Seem, that such certificate may be corrected or reformed by the Court in certain particulars wherein it is shown to be erroneous.

That interest on the sum so awarded will run, not from the date of such certificate, but from the date of the completion of the contract.—*Quebec Harbour Commissioners & Peters et al.*, in appeal, Dorion, Ch. J., Tessier, Cross, Baby, Church, JJ., May 6, 1890.

* 16 Q. L. R.

APPEAL REGISTER.—MONTREAL.

Monday, September 15, 1890.

Ford & Whelan.—Motion to dismiss appeal. Granted as to costs.

Wright & Muldoon.—Petition for leave to appeal. C.A.V.

Lallemand & Bank of Nova Scotia.—Petition to dismiss appeal granted.

McNaughton & Exchange National Bank.—Petition to dismiss appeal. C. A. V.

Laflamme & St. Jacques.—Petition for leave to appeal from interlocutory judgment. C.A.V.

Rhode Island Locomotive Works & Farwell et al.—Acte of discontinuance of appeal with costs to respondents granted.

Workman et al. & Farwell et al.—Same entry.

McKechnie et al. & Farwell et al.—Same entry.

Dominion Bridge Co. & Perrault.—Acte of discontinuance of appeal granted, with costs to respondent.

Hurdman & Thompson.—Petition for leave to appeal from interlocutory judgment. Petition dismissed with costs.

McBean & Blachford.—Heard. C. A. V.

Atlantic and North-West R. Co. & Judah.—Part heard.

Judah & Atlantic and North-West R. Co.—Part heard.

Tuesday, September 16.

Gillard & Moore.—Motion for leave to appeal from interlocutory judgment. Motion rejected with costs.

Atlantic and North-West R. Co. & Judah.—Hearing concluded. C. A. V.

Judah & Atlantic and North-West R. Co.—Hearing concluded. C. A. V.

Poudrette Lavigne & Poudrette Lavigne.—Part heard.

Wednesday, September 17.

Wineberg & Hampson.—Motion to quash appeal for acquiescence. Motion rejected.

Horsman & Darling.—Motion for new security granted.

Poudrette Lavigne & Poudrette Lavigne.—Hearing concluded. C. A. V.

Reburn & Ontario and Quebec R. Co.—Heard. C. A. V.

Benning & Rielle.—Heard. C. A. V.

Watson & Johnson.—Part heard.

Thursday, September 18.

Watson & Johnson.—Hearing concluded. C.A.V.

Brock & Gourley.—Heard. C. A. V.

Robillard & Dufaux. Heard. C. A. V.

Lanciot & Gundlack.—Part heard.

Friday, September 19.

Lanciot & Gundlack.—Hearing concluded. C.A.V.

Saturday, September 20.

Ex parte F. X. St. Arnault.—Petition to be admitted a bailiff granted.

Lambe & Allan et al.—Heard. C.A.V.

Turnbull & Browne.—Heard. C. A. V.

Monday, September 22.

Wright & Muldoon.—Petition for leave to appeal from interlocutory judgment rejected.

Laflamme & St. Jacques.—Petition for leave to appeal from interlocutory judgment granted.

McNaughton & Exchange National Bank.—Motion for new security rejected with costs.

Dominion Oil Cloth Co. & Coalier.—Judgment reversed; Tessier and Baby, JJ., dissenting.

McFarlane & Fatt.—Confirmed (with a modification).

Great Northwestern Telegraph Co. & Montreal Telegraph Co.—Confirmed.

McBean & Blachford.—Reversed, Tessier and Baby, JJ., dissenting.

Tait & Mantha.—Appeal dismissed, the appellant making default to appear.

Mitchell & Ewing.—Settled out of Court.

Corbeil & Cité de Montréal.—Heard. C. A. V.

Merchants Bank & Parker, (Nos. 120 and 121), *Ontario Bank & Parker*; *Molsons Bank & Parker*.—Part heard.

Tuesday, September 23.

Scott & McCaffrey.—Motion to have record completed. Motion granted.

Stanton & Canada Atlantic R. Co.—Motion for increase of amount of security rejected.

Merchants Bank & Parker; *Ontario Bank & Parker*; *Molsons Bank & Parker*.—Hearing concluded. C. A. V.

Watts & Wells (two appeals).—Heard. C.A.V.

Thompson & Dominion Salvage and Wrecking Co.; *Brown & Dominion Salvage and Wrecking Co.*—Part heard.

Wednesday, September 24.

Hagar & Seath.—Reversed; Dorion, Ch. J., and Cross, J., dissenting.

Corbeil & Cité de Montréal.—Appeal dismissed with costs of 3rd class.

Wilson et al. & Lacoste et al.—Reversed, Bossé, J., dissenting.

Hill & Ferreri.—Appellant heard *ex parte*.—C. A. V.

Guevremont & Guevremont.—Heard. C.A.V.

Thursday, September 25.

Stanton & Canada Atlantic R. Co.—Motion to have record remitted to Court below in order to apply for additional security.—C. A. V.

Wells & Burroughs.—Heard. C. A. V.

Vigeant & Poulin.—Heard. C. A. V.

Hastie & Hastie.—Heard. C. A. V.

Guevremont & Guevremont (No. 164).—Heard. C. A. V.

Friday, September 26.

Corbeil & Cité de Montréal.—Motion for leave to appeal to Privy Council granted.

Ross & Dupuis et al. & Smith, petr.—Petition to be permitted to intervene granted.

Wood & Maloney.—Petition for leave to appeal from interlocutory judgment rejected.

Ford & Whelan.—Heard. C. A. V.

Filiatrault & Cocker.—Appeal dismissed, the appellant making default to appear.

Rheume & Trudel.—Heard. C.A.V.

Lalonde & Rozon.—Heard *ex parte*. C.A.V.

Lindsay & Chaplin.—Heard. C.A.V.

Perrault & Montreal and Sorel R. Co.—Heard *ex parte*. C. A. V.

Saturday, September 27.

Stanton & Canada Atlantic R. Co.—Motion for additional security rejected.

Dandurand & Mappin.—Submitted on facts. C. A. V.

Reburn & Ontario and Quebec R. Co.—Heard. C.A.V.

The following cases were stricken from the roll, no proceedings having been taken within the year:—

Dolan & Cie. de Pret et Crédit Foncier.

Poudrette & Ontario and Quebec R. Co.

Canadian Pacific R. Co. & Paterson.

Laplanche & Parenteau.

Orcutt & Mittlemore.

Ontario and Quebec R. Co. & Poudrette.

McBean & Marler et al.—Motion to dismiss appeal, granted for costs only by consent.

Benning & Atlantic and N.W.R. Co.—Heard. C. A. V.

The Court adjourned to November 15.

Délibérés after September Term:—Atlantic and N. W. R. Co. & Judah; Judah & Atlantic and N. W. R. Co.; Poudrette Lavigne & Poudrette Lavigne; Reburn & Ontario and Quebec R. Co.; Benning & Rielle; Watson & Johnson; Brock et al. & Gourley; Watts & Wells, (Nos. 51 and 52); Robillard & Dufaux; Lanctot & Gundlack; Lambe & Allan et al.; Turnbull & Browne; Merchants Bank and Parker (Nos. 121 and 122); Ontario Bank & Parker; Molsons Bank & Parker; Hill & Ferreri; Guevremont & Guevremont (No. 269); Wells & Burroughs; Vigeant & Poulin; Hastie & Hastie; Guevremont & Guevremont (No. 164); Ford & Whelan; Rheume & Trudel; Lalonde & Rozon; Lindsay & Chaplin; Perrault & Montreal and Sorel Ry. Co.; Dandurand & Mappin; Reburn & Ontario and Quebec R. Co.; Benning & Atlantic and N. W. R. Co.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 312.]

Though goods (as cloth) be at the risk of A who has received them to work upon them for B, though the bailment to A be expressly at his risk till the goods be finished and accepted by B as finished; a fire destroys all in A's possession; A, who has insured "his stock of clothing, manufactured and in process of manufacture," cannot recover for B's benefit, or in any way the value of B's stuff destroyed by the fire, the policy containing the proviso: "The company are not to be liable for loss for property owned by any other party, unless the interest of such party is stated on this policy."¹

The plaintiff was held to be uninsured,

¹ *Getchell v. Aetna Ins. Co.*, 14 Allen's Rep. (Mass.).

even to the extent of the value of his labor upon B's cloth, which was about \$600. B. lost \$2,000, value of the cloth.

§ 183. *Notice of previous or subsequent insurance.*

"Notice of all previous assurances upon property assured by this company, shall be given to them, and endorsed on this policy, or otherwise acknowledged by this company in writing, *at or before* the time of their making assurance thereon, otherwise the policy subscribed by this company shall be of no effect. And in case of subsequent assurance of property assured by this company, notice thereof must also be given to them, to the end that such subsequent assurance may be endorsed on the policy subscribed by this company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease, and be of no effect."

The above is a condition in most American policies.

The clause in some policies reads: "If the assured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect." (*Aetna Policy.*)

Such conditions will be enforced; nevertheless their words ought not to be extended. By the condition firstly above printed, the duties upon the insured are greater as regards previous insurances than as regards subsequent. As regards the former, notice is to be given to the insurers *and* endorsed on the policy, or otherwise acknowledged in writing, *at or before* the time of the policy, otherwise it shall be of no effect.

Suppose the fact of previous insurance to be forgotten till a week after the second policy; then, second insurers to be informed of it, and to endorse it on their policy, surely, if afterwards a fire happened, the second insurers could not escape by referring to the wording of the above first clause of condition, "at or before the time of their making insurance, etc." This shows that literal interpre-

tation is unjust sometimes, and the spirit is to govern, more than the letter.

A policy was made with the usual conditions. One was that notice of all previous insurances should be given to the company and endorsed on the policy, or otherwise acknowledged in writing,—or the policy to be of no effect. Another condition was that all notices must be in writing. Another insurance was in the Gore Mutual, but not endorsed. B. claimed that he had informed the company's agent of the Gore Mutual insurance, and the company's agent promised to find out its amount, etc., and he promised to have it endorsed in writing, etc. The application was held not true, and verbal notice to company's agent, of no use.

The 13th condition of the Liverpool & London Fire & Life Insurance Company, is, that the company shall not be liable for loss by fire in any building under construction or repair, wherein carpenters are employed, unless the special consent of the company be first obtained and endorsed on the policy.

Very rarely is this endorsement made, but a receipt on a separate piece of paper is given instead, declaring reception of premium for carpenters' risk. Such receipt being given, would the above condition operate notwithstanding?

As regards subsequent insurance, notice must be given, in default whereof the policy shall cease; but no time for giving the notice is fixed, and it is to be given "to the end that" etc. According to the letter, the insurer is not freed merely because the insured has not had endorsed on his policy or acknowledged in writing, the fact of his subsequent insurance. "*Qui veut la fin veut les moyens,*"—the end attained all is well. As to the time for giving notice, where none is expressly fixed, a reasonable time would be allowed, and as to what was or was not a reasonable time, the jury might, fairly, decide, according to circumstances. According to the law of Lower Canada, an insured would recover in such a case though giving notice only with his particulars of loss, the end of the insurer being obtained by the late as by an earlier notice. Certainly the insured could not be repelled if he effected double insurance one day, and fire happened the day

afterwards, and before notice was given of the double insurance.

If double insurance exist, without notice, contrarily to a condition, though only for a time, and it cease to exist before loss, so that at the time of loss only one insurance (the original one) exists; yet the original insurers are free.¹ There was a time during which the evil existed that they meant to guard against, namely the temptation to fraud, while the two insurances existed.

Where other insurances are to be notified and endorsed on the insured's policy, the insured cannot recover on his policy unless such endorsement be made, though he gave notice and asked for the endorsement, and alleges neglect of the insurers to indorse.²

Other insurances if to be declared *à peine de nullité* must be in France. There is nothing to prevent any number of insurances in the absence of a clause to that effect. C. Com. 359, recognizes successive insurances. The first insurer has to pay, first, the whole loss if the policy be sufficient. If he only insured for partial or small amount, (less than the loss) the second policy is resorted to, and *ainsi de suite*; but companies by their policies, derogate and stipulate for contributions *pro rata* of their interests, and as if all the policies were of one date. A subsequent void policy does not hurt a person insured by an earlier insurance policy, though this read that if the insured make other insurance without consent of the insurers, the policy shall be void.

It is sufficient, too, that the second policy be merely *voidable*. So held in Iowa, (latest cases) Massachusetts, New Hampshire, Ohio, Pennsylvania, Maine, New Jersey, Illinois. Opposed to the above, are: *Bigler v. N. Y. C. Ins. Co.*, and English cases, and *Prov. Wash. Ins. Co.* 16 Peters, but Bigler's case was that of plaintiff suing on first policy paid on second one. Yet in Ohio they hold that a man who got second policy amount, might yet sue on first policy. *Firemans Ins. Co. of Dayton v. Holt*, Nov. 1879. Alb. L. J. of 1880, p. 357.

If notice be given, and demand to endorse be made, *semble*, this would be sufficient, if

the company refuse or neglect to endorse. But the plaintiff ought to show that he did all he could to fulfil his obligation to get the endorsement. There may be a recovery for the loss in the Province of Quebec in such case, though the condition be not literally complied with. The defendant ought to be held barred owing to his fault.¹

In the case of *Conway Tool Co. v. Hudson River Ins. Co.*,² the insurance was to cease, if any further insurance be effected "without having the same endorsed on the policy, or otherwise acknowledged in writing." (There was really no prior insurance, though the insured declared there were two.) Subsequent insurance was effected, and not endorsed, nor acknowledged in writing. The agent of the defendants who issued their policy was examined, to prove by parol that he authorized by parol such subsequent endorsement. His statements were held to be inadmissible.³

CONFLICT OF LAWS—FOREIGN COUNTRY—AUTHORITY OF AGENT.

An interesting point on the conflict of laws in cases of agency was decided by Mr. Justice Day, on the 2nd inst. in the case of *Chatenay v. Brazilian Submarine Telegraph Company, Limited*. The point is an entirely new one, and raised the question whether a power of attorney given in a foreign country, but put in force in this country, is to be construed according to the law of the country where it was given, or according to the law of the country where it was put in force. Story, in his work on the Conflict of Laws, says that this point has never, so far as his researches extended, been directly decided either in America or any other country, so that there is no direct authority on the question. The case came before the court under the following circumstances:—The plaintiff, who was resident and domiciled in Brazil, executed in Brazil a power of attorney, whereby he empowered the attorney, a stockbroker in London, "specially to purchase and sell shares

¹ *Carpenter v. Prov. Wash. Ins. Co.*, 4 Howard, 223.

² Supreme Court, Mass. A. D. 1853, 12 Cushing's Rep.

³ The pretension of the insured was, that the subsequent insurance was to take the place of the prior insurances talked of.

¹ *Jacobs v. Equitable Insurance Company*, 18 Upper Canada Queen's Bench, p. 18.

² *Noad v. Provincial Ins. Co.*, 18 U. C. Q. B. p. 584.

in public companies and public funds, receive the dividends as they may accrue due, and give receipts in conformity with his letters of orders." Armed with this authority, the attorney sold out certain shares which the plaintiff held in the defendant company, and the present action was brought to recover the shares or their value from the defendant company. The plaintiff's right so to recover, it was admitted, depended on the question whether, under the terms of the power, the agent had power to dispose of the shares without the plaintiff's consent, and this again depended on the question whether the document was to be construed as to the powers conferred on the agent, according to the Brazilian or English law; for it was admitted that if construed according to English law, the document would have given the attorney a more limited power than if construed according to Brazilian law. No doubt, if English law had given the agent a wider authority than the Brazilian law, it would have been contended, and would probably have been held, that persons dealing with the agent in England would have been entitled to rely on the wider authority given by English law, and that the foreign principal would have been stopped from setting up the more limited authority as given by the law of his own country; but the present case was different, as it was a case where the English law gave the more limited authority, and there could not therefore be the same hardship upon persons dealing in England with the agent. Mr. Justice Day decided that the document was to be governed by English law, thus adopting the view of Story, where he says (paragraph 286): "There is no doubt that where an authority is given to an agent to transact business for his principal in a foreign country, it must be construed, in the absence of any counter-proofs, that it is to be executed according to the law of the place where the business is to be transacted."—*London Law Times*.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Sept. 21.

Judicial Abandonments.

Zéphirin LaFrance, hotel-keeper, Quebec. Sept. 20.
Damase A. Morin, trader, Fraserville, Sept. 23.

Curators appointed.

Re Wm. Beattie, trader, Melbourne.—L. Thomas and Jas. Mairs, Melbourne, joint curators, Sept. 16.

Re Raymond Beaudoin.—C. Desmarceau, Montreal, curator, Sept. 19.

Re Bossé & Lee.—Kent & Turcotte, Montreal, joint curator, Sept. 19.

Re Joseph A. Bougie *et al.*—Millier & Griffith, Sherbrooke, joint curator, Sept. 22.

Re David Lanthier, Montreal.—Kent & Turcotte, Montreal, joint curator, Sept. 19.

Re Séverin Marois, hotel-keeper.—J. E. Archambault and H. Champagne, St. Gabriel de Brandon, joint curator, Sept. 17.

Re Joseph Millette.—J. A. Marcotte, Montreal, curator, Sept. 23.

Re Napoléon Rousseau, baker, Quebec.—F. X. Lemieux, Quebec, curator, Sept. 24.

Re "The Stair Coal-Mine & Manufacturing Company, Limited."—G. H. Patterson, Montreal, liquidator, Sept. 15.

Re Viger & Grundler, Montreal.—Kent & Turcotte, joint curator, Sept. 19.

Dividends.

Re D. Campbell & Son.—Second and final dividend, payable Oct. 13, A. F. Riddell, Montreal, curator.

Re C. H. Craig & Co.—First and final dividend, payable Oct. 16, F. Valentine, Three Rivers, curator.

Re N. Deschamps & Co. (Eugénie Charlebois).—First and final dividend, payable Oct. 13, C. Desmarceau, Montreal, curator.

Re Laughram Adams.—First and final dividend, payable Oct. 8, G. Deserres, Montreal, curator.

Re Appolinaire Morency, tailor, Quebec.—First and final dividend, payable Oct. 13, H. A. Bedard, Quebec, curator.

Re John Reiplinger.—First and final dividend, payable Oct. 14, John MacIntosh, Montreal, curator.

Appointment.

Jules Allard, Montreal, Advocate, to be registrar for the county of Yamaska, and Clerk of the Circuit Court for the same county.

GENERAL NOTES.

EXAMPLE AND PRECEPT.—The following is from Roger Ascham's Schoolmaster.—It is a notable tale that old Sir Roger Chamloe, sometime Chief Justice, would tell of himself. When he was ancient in Inn of Court, certain young gentlemen were brought before him to be corrected for certain misorders; and one of the lustiest said: 'Sir, we be young gentlemen; and wise men before we have proved all fashions, and yet those have done well.' This they said because it was well known Sir Roger had been a good fellow in his youth. But he answered them very wisely. 'Indeed,' saith he, 'In youth I was as you are now; and I had twelve fellows like unto myself, but not one of them came to a good end. And, therefore, follow not my example in youth, but follow my counsel in age, if ever ye think to come to this place, or to these years, that I am come unto: lest you meet either poverty or Tyburn in the way.'

The Legal News.

Vol. XIII. OCTOBER 11, 1890. No. 41.

A curious case of keeping a cause of action alive against a defendant during half a lifetime occurs in *Hume v. Somerton*, 59 Law J. Rep. Q.B. 420. A writ was taken out in 1861, and renewed every six months since. The point of the long-cherished weapon has at length been turned aside by the Court, it being held that though the writ had been renewed every six months under the old Act, it had become a nullity, because it had not been renewed under the rules of 1883, which require the order of the Court for such a purpose. The case serves as an illustration of the propriety of the new rules.

The *Law Journal* (London), in an article on the protection of wild birds, directs attention specially to the fact that during five months of the year, beginning 1st March, and ending July 31, all the wild birds of the kingdom are entitled to enjoy absolute immunity from molestation from the snare of the fowler, as well as from the fowling-piece of the gunner, subject to certain unimportant exceptions. This monition is evoked by the fact that one day last spring, a party of "officers and gentlemen" deliberately invaded the island rock of Grassholm, the home of innumerable sea-birds, for purposes of "sport." It seems that their idea of sport consisted in wandering about the rock, picking the eggs out of the eyries, smashing the bad ones, and knocking down the parent birds with sticks, because, as one of the sportsmen said, "it was better sport and fun than shooting them." This novelty in sport, however, led to an interpellation in Parliament, and the Government having declined to prosecute, a prosecution was duly instituted by the Royal Society for the Prevention of Cruelty to Animals, and a fine was imposed on the offenders.

A correspondent sends us a clipping from a New York journal, containing an account of the origin of the now famous chicken case.

It appears that the magistrate or petty judge decided in favor of the hen that hatched out the egg, or her owner. This decision has been criticized. One critic says:—

"Hatching is a 'mechanical' process, and not at all characteristic of motherhood. Indeed, science has demonstrated that it isn't a hen at all which hatches, but heat, so that the sitting hen is simply a natural radiator. Moreover, you cannot imagine a mother without there being a father, and though no chick has ever asked who its father is, yet it is clear, only the hen that 'laid' the particular egg could have been mother to that father; and hence, *q. e. d.* to the chick. Besides, it seems to me, the judge should have noticed that it is the hen which lays that is constantly voicing motherly joy and pride over every newly laid though undeveloped offspring. Isn't the strutting about in great style, saying: 'This is my little lay. This is my little lay.' Or can it be that our great jurist and linguist hasn't yet mastered the cackle language? Down, say I, with the sitting hen. It is the hen that lays which justly claims the proud title of motherhood."

Another critic observes:—

"Judge McAdam makes the mistake of mixing up eggs and chickens, when it is merely a question, not between hen and hen, but between farmer and farmer. The law is clear, and the maxim 'that he who does a thing through another does it himself,' applies. Therefore, farmer A, through his duly authorized hen, laid the egg himself on B's premises. What stress or urgency of circumstances forced him to lay this egg in the wrong place need not concern us. The egg being there, farmer B came, and by his duly authorized agent, his sitting hen, hatched out the egg, whence the chicken in dispute. Now there was nothing which compelled farmer B, through his hen, to hatch out that egg. Having chosen to do so, he must be held to the consequences, and I think he is clearly chargeable with notice in the eyes of the law, that he, farmer B, had not, through his hen, laid this egg, and that therefore it was the egg laid by some other father. This being so, the law is clear. Farmer A is entitled to the egg which he laid and its proceeds and natural increase; at most farmer B is entitled to a mechanic's lien for work, labor and services in hatching out the egg. * * * There is no need further to addle our brains over the matter."

There is no doubt that the process of hatching may be regarded as mechanical; still, without that process, the embryo chick would never have seen the light. The egg, if not taken care of by the sitting hen, would soon have been worthless. We find some support for the hatcher's claim in the articles of our Civil Code. Art. 429 says: "The right of accession, when it has for its object two movable things, belonging to two different owners, is entirely subordinate to the principles of natural equity." Art. 430 says: "When two things belonging to different

owners have been united so as to form a whole, although they are separable and one can subsist without the other, the whole belongs to the owner of the thing which forms the principal part, subject to the obligation of paying the value of the other thing to him to whom it belonged." Therefore, if the hatching be the principal part, the hatcher is only obliged to pay the value of the egg to him to whom it belonged. This is further confirmed by Art. 433: "If of two things united so as to form a whole, one cannot be considered as the accessory of the other, the more valuable, or if the values be nearly equal, *the more considerable in bulk* is deemed to be the principal." The chicken is certainly more considerable in bulk than the egg, and therefore the hatcher of the chicken is entitled to keep it, on paying the value of the egg. But, on the other hand, we must quote Art. 434. which seems to upset this reasoning, for it says: "If an artisan or any other person have made use of any material which did not belong to him, to form a thing of a new description, whether the material can resume its previous form or not, he who was the owner of it has a right to demand the thing so formed, on paying the price of the workmanship." So, the owner of the egg would be intitled to demand the chicken on paying compensation for the hatching. But Article 435 says: "If, however, the workmanship be so important that it greatly exceeds the value of the material employed, it is then considered as the principal part, and the workman has a right to retain the thing, on paying the price of the material to the proprietor." So it would resolve itself into a question of fact whether the value of the hatching greatly exceeds the value of the egg employed. This is a question on which we are without exact information.

COUR DE MAGISTRAT.

MONTREAL, 30 avril 1890.

Coram CHAMPAGNE, J. C. M.

BRUNEAU v. De. BERTHAUME, et BEAULNE,
intervenants.

Locateur et locataire—Privilège—Présomption—Pensionnaires.

JUGÉ:—1o. *Que le privilège du locataire étant basé sur la présomption, en faveur du pro-*

priétaire, du droit de propriété du locataire sur les meubles qui meublent la maison, ce privilège cesse d'exister quand le propriétaire est informé que certains meubles qui garnissent la maison n'appartiennent pas au locataire.

2o. *Que les effets d'un pensionnaire dans une maison de pension ne sont pas sujets au privilège du locataire.*

Le demandeur poursuit pour \$50 pour loyers échus, et ayant accompagné son action d'une saisie-gagerie il fit saisir tous les meubles qui se trouvaient dans la maison louée.

L'intervenant dans son intervention allègue qu'il était et est le seul et unique propriétaire absolu d'un piano saisi dans la dite maison; que le demandeur avait été averti des l'entrée du dit piano dans la maison qu'il n'appartenait pas à la défenderesse, mais à l'intervenant; que de plus la défenderesse tenait maison de pension, qu'il était pensionnaire chez elle et qu'il ne devait rien pour sa pension.

Le demandeur cita: *Thomas v. Coombe*, 7 Leg. News, 77.

L'intervenant cita: *Nordheimer v. Hogan*, 2 L. C. J. 281; *Delvecchio v. Lesage*, 9 R. L. 550; *Easty v. Fabrique de Montréal*, 17 L. C. R. 418; *Sheridan v. Tolan*, 5 Leg. News, 298; *Lorrain*, *Code des locataires*, p. 138, No. 383, No. 387.

La Cour soutint les prétentions de l'intervenant.

Saisie-gagerie cassée quant au piano, et intervention maintenue avec dépens.

Jodoin & Jodoin, avocats du demandeur.

Beauchamp & Dorval, avocats de l'intervenant.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 6 décembre 1889.

Coram CHAMPAGNE, J. C. M.

LALUMIERE v. ROY.

Protêt—Frais—Action.

JUGÉ:—*Que lorsqu'un protêt est indispensable, et que celui qui proteste a raison de protester, le demandeur a une action en recouvrement des frais du protêt.*

PER CURIAM:—Le défendeur a vendu au demandeur une propriété quitte et nette. Plus tard, le demandeur découvre que la propriété est grevée d'une hypothèque de \$1,000; il

fait alors protester le défendeur de la faire disparaître. Le défendeur se soumit au protêt, obtint main-levée de l'hypothèque, mais il refusa de payer les frais du protêt. De là l'action.

Le demandeur en vendant quitte et nette s'exposait à l'obligation d'indemniser le demandeur de tous frais qu'il serait tenu de faire pour dégrever la propriété. Or, le protêt était nécessaire pour forcer le défendeur à faire lever l'hypothèque, et ayant été occasionné par la négligence de celui-ci, il doit en payer le coût.

Jugement pour le demandeur.

Adam & Duhamel, avocats du demandeur.

Judah, Branchaud & Bauset, avocats du défendeur.

(J. J. R.)

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 319.]

In Lower Canada non-declaration of other insurances is not a cause of nullity of a policy in the absence of a condition to that effect, and many things required by policies to be done may, yet, not be done exactly as stipulated and no nullity will ensue. Generally the *peine de nullité* must be stipulated in the policy, else it will not be supplied.¹

In Lower Canada, as in England, if a notice be required to be given to the insurers within a certain time, and to be endorsed within a certain time, under pain of nullity, the notice must absolutely be so given and endorsed.²

Where a policy orders the insured to declare all existing insurances on the same subject, if he insures without so declaring to the new insurer, he commits a reticence, but not fatal to him in case of fire, unless there be a penal clause in the policy to that effect.³ If there were such a penal clause, in vain

would the insured say that the earlier insurance was infected with a vice fatal to it.⁴

If the condition read that other insurance on any house or buildings insured must be notified without delay, insurance on goods need not be so notified.

If a condition in a policy read that prior insurance "must be mentioned in, or endorsed upon," such policy, mere verbal notice of prior insurance given to the agent of second insurers, though he make a memorandum of it in a private book, will be of no use.⁵

If a by-law of an insurance company provide that insurance subsequently obtained without the written consent of the president, shall annul the policy, subsequent insurance followed by the mere verbal assent of the president avoids the policy, though payable, in case of loss, to a third person. That is, I take it, if the president denies. *Sed*, can the president avoid by-laws by his parol? Sometimes the consent of the president and secretary in writing is required (by by-laws) to validate after insurances, as on p. 231, Law Rep. of 1856, Boston.⁶

But a by-law does not bind an assured unless he has contracted to be bound by it. If by-laws be printed on or annexed to policy and made part of it, well; but otherwise. (?)

In *Hale v. Mech. M. Ins. Co.*, (⁴) the policy prohibited other insurance unless the consent of the president should be obtained in writing. Held, that a waiver could not be proved, and that the president's parol consent was null.

¹ See *Bigler* case to this effect, *post.*, but in this case Gros insured with "La Normandie" his workshop and stock in a street named. He transferred it all to another street and insured it here with "Le Nord," as if never before insured. Fire happened, the company, "La Normandie," paid the insured 1,000 fr., and Le Nord would not pay, saying that the things burned were already the subject of another insurance not declared. This was in violation (said "Le Nord") of the clause of its policy; à *peine de nullité* was in the policy of Le Nord. Gros' action was dismissed on the ground that he and La Normandie considered the first insurance subsisting.—*Cour. Imp. Paris*, 17 Jan., 1867. Here I see a clear case of first insurance being as non-existing, and the *Cour. Imp.* judgment I do not approve.

² *Pendar v. American M.I. Co.*, 1853, Mass.

³ *Hale v. Mech. M. F. I. Co.* (Mass.), *Monthly Law Reporter* of 1856.

⁴ 6 Gray; 15 Alb. Law J., p. 323.

¹ Dallos, 2nd part of 1857, p. 31.

² 2 Am. L. Cas., p. 610.

³ Dallos, A.D. 1859, 2nd part, p. 70.

*Mellen v. Hamilton F. I. Co.*¹ was an action by an assignee for the benefit of the creditors of one O'Brien (assured.) The policy prohibited other insurance, unless notified with all reasonable diligence, and indorsed on the policy, or otherwise acknowledged in writing by the insurers. Before the fire the insured did effect other insurance without endorsement or acknowledgment such as required. The agent of both companies was the same man, and he knew of everything, (said the insured;) but, *per Duer J.*, "this is no sufficient answer to the insurers' objection." The loss was held not recoverable, and verdict against the insurers was set aside. (Notice of other insurance is required sometimes by condition partly that the insurers may determine the policy, returning portion of premium—*per Duer, J.*)

Suppose insurance to have been effected, and the insured to take a new policy with condition at head of this section, suppose the first insurance to have been notified and endorsed, but not "at or before the time of making insurance," would the new policy be of no avail? No. Yet, under literal interpretation, yes.

Suppose A insuring his property under conditions at head of section, to have a prior insurance, but expiring two days afterwards, and which he does not intend to renew, is he bound absolutely to give notice of it? Just as much as if it was to expire only in one month or three.²

The condition that the person effecting an insurance must, at or before the time of making insurance, under pain of nullity, give notice of any "other insurance made," will not bind the insured to give notice of insurances afterwards made, under pain of nullity.

If the condition read that the insured effecting an insurance must declare all insurances existing on the property insured, the insured is not bound to declare posterior or subsequent insurances.³ Declaration by the insured of a previous insurance does not amount to a warranty to keep up such insur-

ance, yet ceasing to do so, the risk on the insurer is aggravated.

If double or after insurance be prohibited by the first policy, this policy will be vacated by later or after insurance being taken by the insured.

In a Massachusetts case, where there was a condition against double insurance, a subsequent invalid policy was held not fatal, and the insured was permitted to recover.⁴ But in New York, in one case,⁵ the condition was held fatal whether the second insurance could be avoided or not. In another case,⁶ in the same State, the contrary was held. In Ohio also, it was held⁷ that a condition against subsequent insurance was not broken by the taking of subsequent policies which never took effect by reason of conditions therein contained. The Louisiana rule is different.⁸

If the charter of the defendant company say that it shall go free in all cases of other insurances by the insured, not endorsed upon the defendant's policy under the hand of their secretary, the company cannot waive this form.⁹

Where previous insurance has to be notified and endorsed, or the policy is to be null, parol evidence cannot be adduced to prove that, though there was previous insurance, the second insurers (defendants) knew of the previous insurance.¹⁰

In such cases as the above, what if two or three subjects be insured at first, and other insurances be effected only on one of them? Is there to be divisibility?

Is a mortgage creditor insuring bound to declare other insurances save of his own? *Semble*, No! not, for instance, the owner's

¹ *Thomas v. Builders' Fire Ins. Co.*, Mass., A.D. 1875. It has been so held in Iowa, and in Maine a negatory policy constitutes no contract at all.

² *Bigler v. N. Y. Central Ins. Co.*, 22 N. Y.

³ *Carpenter v. The Prov. Washington Ins. Co.*, 16 Peters.

⁴ *Insurance Co. v. Holt*, Albany L. J., A.D. 1880, p. 284; *Thomas v. Builders' F. Ins. Co.*, 119 Mass.; 20 Am. Rep. is cited.

⁵ *Allan v. Merchants' Mutual Ins. Co.*, 30 La. Annual.

⁶ *Couch v. The City F. Ins. Co. of Hartford*. Flanders, p. 49, in note.

⁷ *Barrett et al. Union M. F. Ins. Co.*, 7 Cushing.

¹ 5 Duer's R.—Flanders, p. 246, is against Duer. He does not notice the Mellen case.

² See *ante*, Jacobs case.

³ It has been so judged in France, Colmar, 20 January, 1836.

insurances, though known to the mortgage creditor.

It was stipulated that when a subsequent insurance on the same property should be made without the consent in writing of the defendants, it should, *ipso facto*, annul the first policy, and in a subsequent policy issued by later insurers, it was stipulated that if the insured "shall have made," or shall hereafter make, other insurance without the consent of such subsequent insurer, the (subsequent or later) policy should be null; it was held that the subsequent policy, being inoperative, could not be set up by the defendants as evidence of a subsequent insurance (a valid policy, only, being such), and that, consequently, the first policy remained in force.¹

In *Traders' I. Co. v. Roberts*² (decided in 1832) R. insured with one company, 5th June, 1827, and at once transferred to B. a mortgagee. The policy contained a clause that if the insured effected other insurance, and did not give notice, the policy should cease. On the 3rd June, 1828, R. insured the same property with another company, and gave no notice. Fire happened. B sued in the name of A. He recovered. It was held that A had not power to affect B's rights by a release, and that he could not do so by breach of a condition. But the principle of this case and of *Tillon v. Kingston M. I. Co.*, which relied upon it, was afterwards, very properly, it would seem, disapproved in *Grosvenor v. Atlantic F. Ins. Co. of Brooklyn*, in the New York Court of Appeals.³

In the case of *Tillon v. Kingston Ins. Co.*⁴ it was held that A, assigning his policy to secure B his mortgage claim, if A break the conditions afterwards, B gets nothing. The *Tillon* case would not be followed now, says

¹ *Jackson v. Mass. M. F. I. Co.*, 23 Pick. R. The authors of American leading cases doubt the above. Hunt's Magazine approves of the Massachusetts and Maine decisions instead of the New York cases.

² 9 Wend. Rep.

³ Monthly Law Reporter, A.D. 1858. The *Grosvenor* case was approved by the Supreme Court of Illinois in 1870; *Illinois Mut. F. Ins. Co. v. Fox*, 5 Am. Rep.

⁴ 1 Seld. 406.

Flanders (p. 503), who approves of the *Grosvenor* case as good law.¹

A second insurance may be voidable by second insurers, and yet be a good and sufficient insurance to set aside a first insurance; being unnotified to the first insurers, contrarily to the conditions of their policy.²

Art. 359, Code de Commerce, orders to have no effect second or subsequent maritime insurances, when the value of the subject is covered by a first insurance. This nullity is held not to exist where the first insurance is ineffectual, owing to some breach of contract by the insured towards his first insurers.³

In the case of *Gilbert v. The Phoenix Ins. Co.*,⁴ the condition was that notices of other insurances were to be endorsed on the policy or acknowledged in writing, otherwise the policy to be void. Verbal notice was given to an acknowledged agent of the company. But it was held that such agents have no authority to vary the original written policy agreement.⁵

Some companies have a clause reading against other insurance, or other policies on the same property, whether valid or invalid; but the validity of this condition has been questioned in New Hampshire in the case of *Gee v. Cheshire Mut. F. Ins. Co.*⁶ On the other hand, its validity was not questioned but rather admitted in Maine, in the case of *Lindley v. Union Farmers' Mut. F. Ins. Co.*⁷

In *Bigler et al. v. The New York Central Insurance Company*,⁸ it was held: When the condition of a fire policy requires the insured to give notice of any subsequent insurance, the policy is avoided by a failure to give notice of a subsequent insurance, although

¹ Yet the majority of the Queen's Bench, Quebec, followed *Traders' Ins. Co. v. Robert*, and *Tillon v. Kingston*, in *Black v. National Ins. Co.*, A.D. 1879.

² *Jacobs v. Equitable Insurance Company*, 18 U. C. Q. B. Rep., contrary to *Potter v. Ontario & L. Mutual Insurance Company*, 19 U. C. Q. B. Rep.

³ So held in France, page 1092, Pouget.

⁴ 36 Barbour, 376, A.D. 1862.

⁵ The cases of *Bigler v. N. Y. Central Ins. Co.*, and *Hale v. Mech. Mut. F. Ins. Co.* were mentioned.

⁶ 20 Am. Rep., A.D. 1874.

⁷ 20 Am. Rep. See p. 320 for cases for and against.

⁸ 22 N. Y. Rep. Hunt's Merchants' Magazine, vol. 45, A.D. 1861.

the latter be void (its invalidity, however, not appearing on its face). Second insurance here was stipulated to be null if other insurance existing, not notified. The agreement making null the second policy was for the benefit only of second insurers, and it was and is competent for second insurers to waive it. *Carpenter v. The Providence Washington Insurance Company*, 16 Peters, approved.

37 Maine and 23 Pickering are against such holding that second insurance is null, and that, a second valid insurance not being, first is valid. So held in Massachusetts too, *See Flanders*.

In the case of *Western Assurance Co.*, appellants, and *Atwell*, respondent,¹ on the 18th of June A insured his stock in trade with the Western Assurance Company, and paid premium. On the 28th the policy was sent to him, dated that day, but insuring from the 18th June for a year. It contained the condition at head of this section. Between the 18th and 28th June A effected other insurance with another company, but gave no notice to the Western Assurance Company. A fire afterwards destroyed the stock insured. A gave notice of loss and made claim. The agent of the Western Assurance Company complained that the particulars of the loss were not satisfactory, &c., but he said nothing about the want of notice of the second insurance. In a suit by A the Western Assurance Company pleaded that their policy had, before the fire, ceased to have effect, owing to plaintiff's failure to give them notice of such other insurance. A replied that the defendants were aware of such other insurance, and had waived formal compliance with the condition requiring notice; that the conduct of the defendants' agent in not complaining of such want of notice, but only of other things, amounted to such waiver.

The case was tried in the Superior Court, Montreal, before a jury, who found for the plaintiff, the judge leaving to them to determine whether there had been a waiver by

defendants of their right to urge want of notice, and the jury finding that there had been, "without doubt, by the conduct of the defendants subsequently to the fire." A motion for new trial was made by defendants and refused (Day, J. diss.), but this judgment was reversed by the Queen's Bench which considered that the jury had been misdirected, and that there had been no proof of the waiver alleged, and that the jury ought to have been charged to find a verdict for defendants. It granted the motion for a new trial.

In *Pacaud v. The Monarch Ins. Co.*¹ P took from the Monarch Insurance Company a policy having condition prohibiting new insurance without notice, under pain of nullity of the policy. A prior insurance had been effected with another company, of which notice was taken by the Monarch Insurance Company. Afterwards P substituted for this earlier insurance two others in other companies without notice to the Monarch Insurance Company, but to the knowledge of their agent. In a suit by P, the Superior Court, Montreal, held that this did not invalidate the policy granted by the Monarch Insurance Company, and that the substitution of two policies for one formerly subsisting, the total insured being the same amount all the time, was not a new or double insurance within the meaning of the parties. Neither the record nor the report shows whether there was a time at which the insured was merely under the insurance of the Monarch, the other having died.

Had such been the condition of forfeiture, it ought to have worked; for in such case the later insurances would have been new, and the Monarch might have been kept ignorant of them, and one of its objects so defeated.

An insurance company may sometimes rescind and cancel their policies, if they observe new insurances, and not like to see them.

In *Blake v. Exc. Mutual Ins. Co. of Philadelphia*² there were two clauses in the policy, one reading: "Other insurance permitted

¹ 2 L. C. Jurist. This case was disregarded by the Privy Council and by the Queen's Bench in the case of *Chapman*.

¹ 1 L. C. Jurist.

² 12 Gray's Rep. 266, A.D. 1858.

without notice until required;" the other: "In case assured shall have already any other insurance on the property hereby insured, not notified to the company, and mentioned in or indorsed upon this policy, the policy shall be void." It was held that though other previous insurance exist, the first clause saves from nullity of policy, though there was no notification to the company of the said other previous insurance.

A condition that notice of all previous insurances upon the property insured shall be given, or the policy shall be void, applies only to insurances effected by the assured; and not to previous insurances by the former owners of the property.¹

A condition of a policy issued by a fire insurance company was, that notice of any other insurance on the property insured should be given to the company, and that the same should be endorsed on the policy, or otherwise acknowledged and approved by them in writing, else the policy to cease. The insured subsequently effected another insurance on the property, and forwarded a written notice of the fact to the secretary of the company, who replied the next day, "I have received your notice of additional insurance." Held that the assured had done enough, and that there was no breach of the condition, because the insurance company must have apprehended that plaintiff would understand it so, according to all fair interpretation.²

A insured with one company, stating that \$8,000 of other insurance existed. A sum of \$2,000 of it dropped afterwards. Then \$2,000 insurance was effected in another company instead of it, but not notified. This is not new insurance destroying the first contract or policy taken by A.³

THE EGG AND THE CHICKEN.

What is described as an entirely new point has been raised in a recent suit which threatens to mar the pleasant relations that have hitherto existed between two residents of Parkville, L. I. The case involves the

ownership of a valuable game chicken that was hatched in Parkville a month ago by a very ordinary sort of chicken without any particular pedigree.

It came about in this way: James McCaughn, who has made a fortune as a truckman in New York, lives in a handsome house in Washington Avenue, Parkville, and amuses himself by breeding game fowl. His birds are very valuable, and bring from \$20 to \$30 apiece. Mr. McCaughn's hen-yard in the rear of his house adjoins the back-yard of James Gormley's house. Mr. Gormley retired from the truck business about four years ago, and since that time has been living at Parkville. His house, which is as imposing as Mr. McCaughn's, faces Foster Avenue. Gormley, however, has been breeding a common lot of hard-working chickens. A picket fence separates his hen-nery from that of McCaughn's, but occasionally the chickens get mixed up. This never was a cause of dispute between the two neighbours, as it was easy to distinguish McCaughn's high-born fowls and bring them back to their own coop.

A month ago one of Gormley's hens hatched a brood of chickens, and among them was one that gave evidence of game blood. Several days later McCaughn noticed the stranger in Gormley's coop, and immediately put in a claim for it on the ground that one of his fancy hens must have flown over into Gormley's yard and laid an egg in Gormley's hen's nest. On this theory he claimed the chicken. There was no doubting that the chicken was of the same breed as McCaughn's chickens, but Gormley refused to give it up. He admired the chicken. He offered to pay McCaughn \$1 for the egg, but he said that McCaughn's claim on the bird was offset by the fact that one of his hens had worked twenty-one days to hatch the egg. McCaughn would not accept the offer. He wanted the chicken, and he was willing to pay a reasonable price for the services of his hen in hatching the egg, and for whatever corn and other food the chicken had eaten. Gormley rejected McCaughn's offer, and words passed between the neighbours.

After the passage of the words, McCaughn engaged Judge Callahan to bring suit for the

¹ *Tyler v. Aetna Ins. Co.*, 12 Wend. 507.

² *Potter v. Ontario & Livingston Mut. Ins. Co.*, 5 Hill, 147.

³ *Parsons v. Standard Ins. Co.*, 43 Q. B. Rep. Ontario.

recovery of the chicken, and Gormley has engaged Wanhope Lynn to defend his case. Judge Callahan says:

"I have searched the legal reports in vain to find a parallel case, and I am convinced that the point at issue is new. It seems to me that McCaughn has the best right to the chicken. It is a thoroughbred, and his hen undoubtedly laid the egg from which it was hatched. He is willing to compensate Gormley for his trouble and the hen's services. The case will have to be argued on equity. If Justice McMahon of Parkville decides against us we will appeal the case. It is not a question of the money value of the case, but of the right of the case."

Mr. Wanhope Lynn has put in his answer, which is a general denial of McCaughn's claims. If Gormley's hen had not protected this egg, he says, the chicken in question would never have been hatched. Then again if the eggs had been collected and cooked, the game chicken would have been lost. Then there is another theory which he asserts the appearance of the chicken seems to bear out. There was nothing to prevent one of Gormley's roosters from being the father of the egg. A father's claim according to law is paramount, and if this theory is correct, then the chicken belongs to Gormley's coop.

Mr. Lynn is also resolved to appeal the case if the decision is against him. He has submitted the problem to a number of lawyers, and they are about equally divided in their opinions as to the equity of the suit. The Hon. Bourke Cockran thinks that McCaughn has the best claim to the chicken, on the ground that one of his hens laid the egg. Robert H. Racey, the criminal lawyer, warmly and pertinaciously supports the claims of Gormley's hen. The question is being debated on lay grounds in Parkville, where, on account of the prominence of McCaughn and Gormley, it has excited a great deal of interest. Nearly all the ladies think that Gormley has the better claim to the chicken. The suit will come up for a hearing before Justice McMahon next week.

In the meantime the game chicken is industriously scratching in Gormley's backyard.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 4.

Judicial Abandonments.

Godfroi Bedard, lumber merchant, Montreal, Sept. 30.
Olivier Bégin, shoe manufacturer, Quebec, Oct. 2.
Marie Bélanger, doing business in name of Joseph Labelle & Co., St. Johns, Sept. 23.
F. X. Billy, trader, Victoriaville, Sept. 30.
Chaotus Henri Desmarais, trader, Montreal, Sept. 30.
Wilbrod Doré, trader, Quebec, Sept. 24.
Albert Marquette, Quebec, Oct. 2.
Auguste Perron, St. Sauveur de Québec, Sept. 27.

Curators Appointed.

Re Beauchamp & Co., grocers.—Bilodeau & Renand, Montreal, joint curator, Sept. 29.
Re Emile Bécu, trader, Anse aux Gascons.—L. P. Lebel, New Carlisle, curator, Sept. 15.
Re Robert G. Berry.—Millier & Griffith, Sherbrooke, joint curator, Sept. 29.
Re Cantin & Dulong, contractors, Montreal.—Charles E. L. Deslauniers, Montreal, curator, Sept. 30.
Re Dame Marie Goyette, doing business under the name of Dme. Louis Baril & Co., Iberville.—J. A. Nadeau, N. P., and Joseph Lavoie, Iberville, joint curators, Sept. 24.
Re Geo. H. Gauvreau, trader, Montreal.—David Seath, Montreal, curator, Sept. 24.
Re Léandre Larivée, Montreal.—Kent & Turcotte, Montreal, joint curator, Oct. 2.
Re Benjamin Leclaire, St. Michel de Napierville.—Kent & Turcotte, Montreal, joint curator, Sept. 30.

Dividends.

Re Eugène Corriveau, jeweller, Quebec.—First and final dividend, payable Oct. 20, H. A. Bedard, Quebec, curator.
Re C. N. Falardeau, trader, l'Ancienne Lorette.—Second dividend, payable Oct. 20, H. A. Bedard, Quebec, curator.
Re Germain & Payette.—First and final dividend, payable Oct. 21, C. Desmarceau, Montreal, curator.
Re F. X. T. Hamelin, paper manufacturer, N. D. Portneuf.—Second dividend, payable Oct. 21, A. O. Mayrand, Desmarceau, curator.
Re J. P. Morin, Stanhope.—First and final dividend, payable Oct. 22, Kent & Turcotte, Montreal, joint curator.
Re Antoine Perroton, Hull and North Nation Mills.—First and final dividend, payable Oct. 20, J. McD. Hains, Montreal, curator.

Separation as to property.

Adéline Bernard vs. Joseph Emond, farmer and trader, Sherbrooke, Oct. 2.
Marie Leforest vs. Jean Bte. Magnan, butcher, Montreal, Sept. 30.

Notarial minutes transferred.

Minutes of late Thomas Brassard and L. P. Tremblay, notaries, Waterloo, and of Joseph H. Lefebvre, N. P., Waterloo, transferred to E. F. de Varennes, N. P., Waterloo.

Appointment.

Cyrille Auger and Charles L. Champagne, appointed joint registrar for the registration district of Montreal East.

The Legal News.

VOL. XIII. OCTOBER 18, 1890. No. 42.

Not long ago (*ante*, p. 127) we published a note of a decision by magistrates of this province, that the operation of dishorning cattle was not a cruelty exposing the persons performing it to prosecution. We notice by a recent article, written by a well-known friend of the animal world (Mr. G. Candy), that the Lord Chief Justice of England and Mr. Justice Hawkins are of a different opinion. There has been considerable doubt on the point. In Scotland a superior court, expounding the Scottish statute, has held that the operation of dishorning is not unlawful, not because the operation was shown to be necessary in fact to fit the animals for their ordinary use, but because "the statute does not interfere with human conduct, or with the judgment of those who are pursuing their own affairs to the best of their judgment, however much they may be mistaken in the judgment of others." One of the judges in the Scottish Court adds that, in his opinion, the operation was justifiable, because it was "performed under the belief that it was necessary for the well-being and control of the animals." But in a recent English case (*Ford v. Wiley*), the judges of the Court of Queen's Bench emphatically dissented from the doctrine that "a mistaken belief that the law justifies a painful operation, when in truth it does no such thing, could operate as any excuse at all, except perhaps in mitigation of punishment." Mr. Justice Hawkins observed: "Constant familiarity with unnecessary torture to and abuse of dumb animals cannot fail by degrees to brutalize and harden all who are concerned in or witness the miseries of the sufferers—a consequence to be scrupulously avoided in the best interests of civilized society." The occasion which called forth this expression of opinion was the hearing of an appeal from the decision of a bench of Norfolk magistrates, who had acquitted a person charged with cruelty under the statute, and had found

as a fact that the operation of dishorning had been done with ordinary care, and under an honest belief that it was for the benefit both of the animals themselves and of their owner, and that the object in view could not be attained by any other known method. The judgment of the magistrates was held to be erroneous, and the case was remitted to them to be dealt with in accordance with what the judges of the Queen's Bench held to be the law. Mr. Candy also quotes, with severe disapprobation, an opinion in a very different sense, by Mr. Justice Murphy, a judge of the High Court of Justice in Ireland, in a case of dishorning: "The pain caused to the animals cannot be said to be an unnecessary abuse of the animal that is reared up, tended, and fed, with the object of having it, as soon as possible, made ready for slaughter, if the operation by which the pain is caused enables the owners to attain this object, either more expeditiously or more cheaply."

Attention is being directed to the fact that in England a considerable revenue is derived from patent fees, over and above expenses of the office. The fees are very high, it being necessary for an inventor to pay over \$200 to the patent office before he can benefit by a patentable improvement. The system of levying taxation upon the ingenuity and brain power of a people seems a very strange one, but it is supposed to be based upon the old idea that all patents are monopolies.

COUR DE MAGISTRAT.

MONTREAL, 21 janvier 1890.

Coram CHAMPAGNE, J. C. M.

BENOIT v. EDWARDS, et EDWARDS, opposant.

JUGÉ:—*Sur une motion pour faire renvoyer une opposition à jugement, qu'un défendeur condamné par défaut, dont les biens sont saisis et qui fait une opposition afin d'annuler pour prétendues informalités dans la saisie, laquelle est ensuite déboulée avec dépens, n'est pas pour ce fait déchu du droit de faire une opposition à jugement.*

Jodoin & Jodoin, avocats du demandeur,
Walker, avocat de l'opposant,

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 11 novembre 1889.

Coram CHAMPAGNE, J. C. M.

DAGENAIS v. TRUDEAU.

Minorité—Responsabilité—Choses nécessaires—Lésion.

JUGÉ :—*Qu'un mineur peut être poursuivi pour le coût d'habillements qui lui ont été vendus et livrés, sauf son droit de prouver qu'il a été lésé.*

L'action était sur compte pour le prix de deux habillements que le demandeur aurait vendus et livrés au défendeur, à sa demande.

Le défendeur plaida qu'il était mineur et qu'il avait été lésé.

La preuve n'établit pas la lésion plaidée par le mineur, et la Cour jugea que les habillements étant des choses nécessaires à la vie le mineur pouvait être poursuivi pour le recouvrement du prix qu'il était convenu de payer pour ces marchandises.

Jugement pour le demandeur.

Autorités :—Gagnon v. Sylva, 24 L. C. J. 251; Thibaudeau v. Magnan, 4 L. C. J. 146; 20 L. C. J. 131.

O. Robillard, avocat du demandeur.

Archambault & Pélissier, avocats du défendeur.

(J. J. B.)

COURT OF APPEAL.

LONDON, April 21, 22, 1890.

Before LINDLEY, L.J., and BOWEN, L.J.

VANDALA & Co. v. LAWES.

Action to enforce Foreign Judgment—Defence that Judgment was obtained by Fraud—Power of Court to go into Merits.

To an action brought on a foreign judgment in respect of certain bills of exchange, the defence was set up that the transactions between the plaintiff and one L. Reynold were not commercial transactions, but mere Stock Exchange gambling, and that the plaintiff concealed the fact from the foreign Court. At the trial, counsel for the defendant proceeded to cross-examine the plaintiff as to certain payments to show that they were made in respect of gambling transactions. CHARLES, J., stopped the cross-examination

on the ground that the foreign Court had already determined the point, and that it was not open to the defendant to prove the fraud alleged.

On an appeal by the defendants a Divisional Court (DENMAN, J., and WILLS, J.) held that the cross-examination ought to have been allowed.

The plaintiff appealed from this decision.

Their Lordships said there were two clear rules with regard to proceedings to enforce foreign judgments: (1) That the foreign judgment could be impeached on the ground of fraud; (2) that a Court in this country cannot go into the merits which have been tried by the foreign Court. The question then arose what ought to be done when the question of fraud cannot be decided without going into the merits. There had been great difficulty on that point. But the point had been decided in *Aboulloff v. Oppenheimer*, 52 Law J. Rep. Q. B. 1: L. R. 10 Q. B. Div. 295, where it was held that a foreign judgment obtained by the fraud of a party to the suit in the foreign Court, could not afterwards be enforced by him in an action brought in an English Court, although the question whether the fraud had been perpetrated had been investigated by the foreign Court, and their Lordships dismissed the appeal, with costs.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VI.

THE CONDITIONS OF THE POLICY.

[Continued from p. 327.]

Where a policy required the insured to give notice to the insurers of any other insurance in force upon the same property, it was held that notice to that effect, given to a travelling agent, was sufficient, though it never reached the insurers themselves, it appearing that the business of the agent was to solicit insurances, make surveys and receive applications, and that he was notified while actually engaged in preparing an application for the policy in question.¹

¹ *McEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill, 101. See also *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barbour (N. Y.) R. 624.

In the absence of any provision requiring the notice to be given or acknowledged in writing, verbal notice given in his office to an agent authorized to receive applications for insurance and to receive premiums is sufficient.

In the case of *Beals v. The Home Ins. Co.*,¹ where other insurances were to be notified, the other one was notified as existing at date of policy, namely in the O. & L. Co. It however expired in November, and for it was substituted like amount of insurance in the L. I. Co. The agent of defendants was agent of the L. I. Co. It was not expressly held, but *semble* it would have been held not necessary to have notified.

If a condition printed require notice of second insurance to be given immediately and endorsed on the policy, but in the body of the policy be written less, and what does *not* exact immediate notice and endorsement, such notice and endorsement will not be exacted; but notice even after loss and no indorsement may suffice. This was ruled in the case of *Soupras*.²

As to "reasonable diligence" at the end of the *Ætna* clause (*ante*), I would say that that is for the jury. In Lower Canada the insured would probably recover, though giving notice only with his particulars of loss.

Where "notice" is to be given of other insurances, and condition be simply that the notice may be verbal at office, see *Sexton case*, 9 *Barbour*.

If there be no special inquiry, or condition to that effect, the insured is not bound to refer to other insurance.

§ 184. *Levy on Property Insured—Execution against Buildings—Fr. Fu. de Bonis et de Terris.*

Sometimes the condition reads that the policy shall cease if the property insured "shall be levied on or taken into possession under any proceeding in law or equity. Under this condition it has been held that only personal property was in view."³

§ 185. *Effect of Double Insurances.*

Ellis says: Even without a special condi-

tion of the policy, an insured effecting a double insurance can only recover the real amount of his loss, and if he sues one insurer for the whole, that insurer may compel the others to contribute their proportional parts." Kent (Comm., vol. 3) is to the same effect. He refers to *Millaudon v. Western M. & F. I. Co.*,¹ by Curry; so if A insure property with B for \$5,000 and with C for \$5,000, saying nothing to either of the double insurance, he may, if he lose \$5,000, sue either of the insurers, but if one pay in full he may go against the other for half of \$5,000. In England there is contribution between co-sureties whether by separate instruments or by the same one, says *Burge*; this as a result of general equity. In Scotland all of several policies are considered one, and there is contribution. In modern France, *co-fidjussieurs*, whether by one or several deeds, can claim contribution, and this is reasonable, says *Troplong*, No. 426.

According to *Burge*, several insurers, though by different policies, may be considered debtors in *solido*; but are they? I do not think so. Suppose several insurers by policies of different dates, and for different sums, can such be considered debtors in *solido*? Are they *fidjussieurs* at all?

In case of double insurance, the insured may sue whom he pleases of the different insurers, and they have contribution among themselves.² But policies prevent this, sometimes.

If one insurer pays the whole of the loss, he may recover a ratable contribution from the insurer in the other policy; Angell (Insurance)—otherwise the insured might "select his victim," says Angell.

In case of a house burnt, insured by several policies, (unless there be a condition to the contrary) the insured may sue whom he pleases. If the late one pay, as it must, the whole loss when sued, it has a recourse against the others for contribution in proportion to their insurances. Code de Commerce, 359.

It is different in maritime assurance, p. 270, 2nd part, *Sirey* of 1852.

This is the usage, too, says *Sirey*, in a note,

¹ 9 *Tiffany*.

² 1 *L. C. Jurist*.

³ *Ins. Co. v. O'Maley*, 22 *Am. Rep.*, Pennsylvania.

¹ 9 *La. Rep.*

² *Wiggin v. Suffolk Ins. Co.*, 18 *Pick.*

and he says Grun and Joliat approve, No. 142 (Pardessus, *contrà*).

Suppose the first insurer to pay, can he make the late ones contribute?

Where property is insured, and then it, together with other properties, is insured by a policy reading for one entire sum for the totality of subjects, this makes necessary an apportionment.¹

The charter of an insurance company provided forfeiture of any policy covering property otherwise insured, unless such double insurance shall be by consent of the company, endorsed by the secretary upon the policy. Held, that the company could not waive this provision, nor consent except by such indorsement.²

The rule in modern France is that if the entire value is not covered by the first policy, the later insurers have to make up the deficiency according to the dates of their policies. *Semble*, they are not *co-fidéljussurs* so.

In the United States, a condition is frequent that if the insured have made other insurance prior in date, the last insurers shall be liable only for so much as the amount of the prior insurance may be deficient towards covering the property lost insured.

In Lower Canada, the first sued of several insurers, by different policies, has no right to ask the others to contribute; unless, on special grounds, they are bound to. Where there are several insurers, the one (never mind which) who is first made to pay, does nothing more than fulfil an obligation which is his alone. And where double insurance exists, the second can be sued before the first.

Of course, in case of double insurance, or treble, the insurer can never recover more than his loss. There can be gotten by him but one satisfaction for one loss.

The rights *inter se* of several insurers by different policies are various, and different, *semble*, from the ordinary rights of co-sureties by obligation, towards a creditor for a debtor.

¹ The case of *Howard Ins. Co. v. Scrivener*, 5 Hill, is overruled, and this principle (of other insurance being making necessary a calculation) held in *Opden v. East R. Ins. Co.*, 7 Alb. L. Journal of 1873, p. 330.

² *Couch v. City F. Ins. Co.*, 38 Connecticut, A.D. 1872-3.

Often the different insurances are affected by differing conditions on policies. Suppose the insured by several policies, to forfeit, by breach of a condition, his rights against one insurer, can the others, for instance later insurers, say they are free, from the fact of the insured having deprived them of contribution from others, or other? Does the insured contract so? Would the question be affected by knowledge had by the later insurer of the earlier insurance?

Policies may stipulate against contribution, and that the insurers shall be liable in the order of dates of their policies respectively, or that in case of subsequent insurance, the first insurer shall nevertheless be answerable for the full extent of the sum insured by him, without right to claim contribution from subsequent insurers.¹

§ 186. *Limitation of liability in the case of several insurances.*

The following are clauses regulating contribution, or rather limiting the amount of liability of insurers in the case of several insurances:

"In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property." (*Æna* policy, of *Connecticut*)

"And in all cases of assurance, this Company shall be liable only for such rateable proportion of the loss or damage happening to the subject assured, as the amount assured by this Company shall bear to the whole amount assured thereon, without reference to the dates of the different policies." (Other policies.)

Shaw (upon *Ellis*) says that where there are several policies containing the clause providing that, in case of other insurance, the insurers shall be liable to pay only a rateable proportion of the loss, they are all and each liable to pay such rateable proportions, though it happens that some have paid more

¹ 14 Wend. 399.

than their share, and "even enough to cover the whole loss," and this whether they had knowledge of all the policies at the time or not.

He refers to *Lucas v. Jeff. I. Co.* He does not mean that each is so liable that the plaintiff, having been paid his whole loss, say from two, may go against a third insurer and make him pay. I take the case referred to to have been this: Plaintiff sued one of three companies who had insured him. It was held that he had right to recover from each its rateable portion, and if two paid more, yet the third was not freed, but had to pay its rateable portion of the loss. It was not made to appear that the plaintiff had, from the two companies not sued, gotten full indemnity, or enough to cover his whole loss. *Shaw* adds: "Where, however, there are several policies, which do not all contain this clause, and those not containing it pay to the extent of their subscriptions, which is more than their rateable share, this will be a defence *pro tanto* in an action on the policies containing this clause, and if the policies without the clause have paid enough to cover the loss, it is a complete defence for the others, for they are liable to contribute to the underwriters who have paid. *Lucas v. Jefferson Ins. Co.*, 6 Cowen, 635."

There is no contribution between policies containing the clause referred to; the agreement is that each insurer shall be responsible only for a given portion of one sum (say I), but does not *Shaw* imply that there is contribution—contribution it would not be so much as indemnity for money paid. "Shall bear to the whole amount assured thereon," in the above condition, what does this mean? Suppose A on first May, 1860, to insure his house for £500, and at the time of taking this policy to declare a previous insurance of £500 made 1st January, 1860; suppose this 1st Jan. policy to be allowed to expire, and a fire to happen on 1st April, 1861, and to destroy the house worth over £500, may not A recover the £500 of the policy of 1st May? He may; as if the words "at the time of the loss happening" were between the words "assured" and "thereon." If the first insurance be not in force at the time of the loss happening, the second company (in such a case as put) can-

not claim to be liable only for a rateable proportion of the loss.¹

Contribution condition: "Other insurances being, the last insurers are to be liable only proportionately." This extends to other insurances in part on this and in part on other property; although what is insured on one or other be not particularized. *Blake v. Exch. Mut. I. Co.*, Monthly Law Reporter of 1858, *Boston*.

§ 187. *Other insurance upon specific thing included in policy.*

Sometimes there is a condition such as this: "If any specific parcel or thing, &c., included in this policy, shall at the time of fire be insured in this or other office, this policy shall not extend to cover the same, except as to excess beyond the amount of specific insurance," etc.

*Fuirchild v. Liverpool & London Ins. Co.*² was a case of goods burned; value \$274,192. They were insured specifically for \$324,000. The whole amount of loss was covered so by specific insurance. The plaintiff sued for a *pro rata* amount of the loss in proportion to amount insured, but the defendants were freed, and held not liable, for the loss was *under* the amount of the specific insurances, and their policy was conditioned that they should be liable only for any amount of loss beyond the amount of specific insurances.

§ 188. *Divisibility.*

Suppose insurance by one policy on two houses, and on furniture in a third, the total policy may cease, or become vacated, under the condition of certain policies, for alienation of only one of the houses, or of the furniture, though the insurer retain the houses. It is perfectly lawful to fix as *terme* for cessation of a policy the arrival of any event.

Angell, § 196, is to the effect that if three buildings be insured by one policy, each for a separate sum, alienation of one will only avoid the policy *pro tanto*, as if there had been three policies.

*Trench v. Chenango M. Ins. Co.*³ was expressly declared bad law in the following case: S insured for one premium, \$1600, on dwell-

¹ See *Forbush v. W. Mass. Ins. Co.*, 4 Gray's R.

² 48 Barbour.

³ 7 Hill.

ing house; \$800 on furniture, &c. : One condition of the policy required the nature and amount of any incumbrances on the property insured to be stated, and the insurance was to be void in the case of any mis-statement, or concealment. The policy declared: "No incumbrance except the *Petrie* mortgage." There was really an incumbrance on the house beyond this. The Court held that the policy was void in consequence, and that the insured could not recover loss on house, or furniture. The plaintiff was non-suited, and afterwards a new trial was refused him.¹

In France an insurance on different objects is, as a general rule, divisible, and nullity of insurance of some may be, and policy subsist for others. Orleans, 4 July, 1846. But stipulation may regulate otherwise.

Suppose A to insure by one policy £500 on his house in St. Paul street, and £500 on his house in St. Peter street. Afterwards he sells the house in St. Paul street. Because he does not declare that sale, and obtain the consent of the insurers, will he lose the benefit of his insurance on his house in St. Peter street, if it be burnt? It depends upon his policy. If the policy be silent as to alienations, he will not; but if it read prohibiting the property insured by this policy being transferred, in whole, or part, under pain of the policy ceasing, or of the insurance ceasing, he will. Under the English clause at head, I think insurance would only be vacated *pro rata*, though the case is not free from doubt. Such clauses ought to be construed against the insurers (I should say) if doubtful.

§ 189. Removal of property to escape fire.

"In cases of fire, or of loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the assured to use all possible diligence in saving and preserving the property. And if they shall fail so to do, this Company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood, that there can be no abandonment to the assurers of the subject assured."

Ordinarily injuries to property by removing

it, from fear of combustion, and expenses in saving it from destruction, are not losses within the policy; so agreement is common on the subject. In France the policies generally provide that property may be removed when in danger of fire, and that the insurers will bear the costs.

The following is the clause usual in the United States policies:—

"In case of the removal of property to escape conflagration, the Company will contribute *ratably with the assured* and other companies interested, to the loss and expenses attending such act of salvage. But the Company will not hold themselves liable for any loss or damage upon goods removed from any building not actually on fire, contrary to the declared desire of any officer or agent of the Company, or not being ordered or sanctioned by such officer or agent, when personally present, and in a situation to be consulted by the assured."

Notwithstanding such conditions, the insured is to be paid his full loss.

Injury to goods of the insured by water or from goods being stolen in the confusion of a fire are within the terms of the policy, and the insured is to be paid for such.¹

The insurance in this case was for not exceeding £1,000. The defendants contended that as to loss by goods damaged, lost, or stolen in removal, they were only *ratably* to contribute. The Court held that *ratable* contribution was to be confined to mere expenses of any salvors, or expenses of saving what was saved. The insured recovered £397.14.8, his total loss by partial damage to goods, and by lost or stolen goods. It was held that the clause at the head gives the insured a remedy for something beyond compensation for his goods destroyed or injured in consequence of a fire. And so in the *Harris* case, Quebec, A.D. 1866, Meredith, C.J., in charging the jury, said: "The rule which I think you may follow in this case is that which was laid down lately by Mr. Justice Monk, in the case of *McGibbon v. The Queen Insurance Co.*, and which afterwards received the sanction of the Superior Court of Montreal, namely: That the value of goods which,

¹ *Smith v. Empire Ins. Co.*, 25 Barb. R., Oct. 1857.

¹ *Thompson v. Montreal Fire Ins. Co.*, 6 Q.B. and Pr. Rep. U. C.

without any fault on the part of the insured, are lost or stolen during the confusion caused by a fire, or whilst being removed from the burning premises, ought to be borne by the insurers."¹

With respect to the removal of goods, it has been held² that the consent of the insurers beforehand is not required. Consent after removal, or ratification of the act, with a full knowledge of the facts, is equivalent to consent previously.

Under the first of the above clauses, if insurance be "against total loss only," if anything be saved, *semble*, as there can be no abandonment, the insurers are free; but the saved portion ought to be of some value; a house ought to be held totally lost, though some wall of it might be left standing, or *say* a stack of chimneys.

A building is threatened; the insured removes his things. The building escaped. Damage and expense of removal are sued for. Held (two justices dissenting) that he could recover; *White v. Republic & Relief Ins. Co.*, 57 Maine.

§ 190. *Thefts.*

Losses from thefts, at or after fire, are generally excepted in the French policies, and sometimes are so by English policies,—"The Queen," for instance.

In France, some hold that without the express exception, even *vols* and *soustractions* are not losses on the insurers (Boudousquie). Others differ from him.

The Civil Code of Holland puts such losses on the insurers. In Maine, U.S., such losses are put on the insurers.³ So in Lower Canada now, "though formerly it was held otherwise."⁴

The fact of French policies expressly excepting, might lead us to say that the French law (in the absence of the exception) would put the loss on the insurance company.

Some conditions stipulate non-liability for losses from thefts in removals of goods.

The Royal Insurance Company condition

¹ Such alone in the particular case were the plaintiff's losses, fire having occurred in the house next to him.

² *Williamsburg City F. Ins. Co. v. Cary*, Superior Court of Illinois, 15 Alb. L.J., p. 169.

³ *Law Rep.*, A.D. 1833-4.

⁴ *Harris case, ante.*

⁵ *1 Rev. de Lég.*, p. 116.

states:—"This Company shall not be liable, by virtue of this policy, for any loss by theft at or after a fire."

In default of such condition, the insurers would be liable where a building has been fired, and furniture is removed and some stolen so. Bunyon.

§ 191. *Termination of policy by bankruptcy.*

Some companies stipulate that the policy shall end if the insured become bankrupt. This is a good condition; but *état de liquidation judiciaire* is not bankruptcy. The consequences of bankruptcy generally are different from the consequences of *état de liquidation judiciaire*.¹

§ 192. *Usufructuary and nu-propritaire.*

The usufructuary may insure the house subject to his usufruct. If fire happen, he can take the insurance money.² If the *nu-propritaire* insure the house and it burn, he takes the money and need not employ it in rebuilding.³ Yet it is said that the usufructuary can make the *nu-propritaire* allow him the interest.⁴

By the Code Napoleon,⁵ the usufructuary is liable for loss by fire of the house of which he has the usufruct, unless he prove that the fire was without fault on his part. In Quebec province, there is no presumption of fault against the usufructuary. Demolombe to the same effect.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 11.

Judicial Abandonments.

S. Boucher, St. Hyacinthe, Oct. 3.

Armand Boyce, Montreal, Oct. 1.

Joseph Landsberg, trader, Sherbrooke, Oct. 8.

Archibald McCallum, jeweller, Quebec, Oct. 4.

Alexis Therriault, general merchant, Fraserville, Oct. 6.

¹ Dalloz, *Rec. per.* of 1854, 2nd part, p. 167.

² *Grun & Joliat*, No. 86.

³ 25 Aug., 1826, Colmar.

⁴ *Ib.*; *contra* *Grun & Joliat*, No. 91.

⁵ "Il y a présomption de faute contre lui," C.N., 1302, 1315, 1318. Sirey, Dalloz, A.D. 1837. Proud'hon, Tome III., No. 1551, is against this. Our Lower Canada Civil Code seems to enact such presumption strictly against the lessee only, and in favor of the lessor only, (C.C. 1629, 1630.)

Curators appointed.

Re Godfroi Bedard, lumber merchant, Montreal, Oct. 8.

Re Joseph Dagenais, grocer, Montreal.—Thos. Gauthier, Montreal, curator, Oct. 2.

Re Chaetas Henri Desmarais, restaurant-keeper, Montreal.—J. N. Fulton and A. Lamarche, Montreal, joint curator, Oct. 8.

Re Dame Marie Bélanger, trader, St. John's.—A. F. Gervais, St. John's, curator, Oct. 7.

Re Wilbrod Doré, grocer, Quebec.—H. A. Bedard, Quebec, curator, Oct. 8.

Re Zéphirin Lafrance, hotel-keeper, Quebec.—N. Matte, Quebec, curator, Oct. 7.

Re Robert Lanning.—C. Desmarteau, Montreal, curator, Oct. 3.

Re David Latour.—C. Desmarteau, Montreal, curator, Oct. 4.

Re Joseph M. Massicotte, tinsmith, Farnham.—E. Audette, Farnham, curator, Sept. 29.

Re Chas. J. Paige.—C. Desmarteau, Montreal, curator, Oct. 2.

Dividends.

Re Joseph Becotte de Gentilly.—First dividend, payable Oct. 20, Bilodeau & Renaud, Montreal, joint curator.

Re H. Charron & Fils, Ste. Cunégonde.—First and final dividend, payable Nov. 5, Thos. Gauthier, Montreal, curator.

Re A. S. de Carufel, Maskinongé.—First and final dividend, payable Oct. 20, Bilodeau & Renaud, Montreal, joint curator.

Re W. V. Douglas.—First and final dividend, payable Oct. 20, W. J. Simpson, Lachute, curator.

Re Joseph Filion, Napierville.—First and final dividend, payable Nov. 4, A. F. Gervais, St. John's, curator.

Re Isaac Harris, Lachine.—First dividend, payable Oct. 31, Kent & Turcotte, Montreal, joint curator.

Re M. Lajoie & Co., tinsmiths.—First and final dividend, payable Oct. 27, Thos. Gauthier, Montreal, curator.

Re W. C. Ravenhill, agent.—First and final dividend, payable Oct. 31, Kent & Turcotte, Montreal, joint curator.

Re Ed. St. Cyr, trader, Ste. Clothilde de Horton.—First and final dividend, payable Oct. 28, J. E. Girouard, Drummondville, curator.

Re The Montreal Soap & Oil Co.—First and final dividend, payable Oct. 28, W. A. Caldwell, Montreal, curator.

Separation as to Property.

Asilda Cadieux vs. Napoléon Senécal, farmer, parish of St. Bruno, district of Montreal, Oct. 7.

Alice Price vs. Patrick Lee, farmer, township of Godmanchester, district of Beauharnois, Oct. 4.

GENERAL NOTES.

APPLYING FOR STOCK IN FALSE NAME.—The London *Law Times* says: "If a man, applying for shares in a company, hands in a false name, or the name of some one who knows nothing about the application, or the name of an infant, the court will treat that man as the real shareholder, and the name handed in as that of a mere dummy." Such is the wholesome doctrine which Mr. Justice Kay applied in *Re Britannia Fire Association*, Coventry's case, on the 7th of August. The circumstances were peculiar, and induced the learned judge to remark that human affairs are wonderfully like a kaleidoscope, with its constantly changing combinations of color. Coventry, the father, had handed in the name of Coventry, the son, as that of an applicant for certain shares in the above association. Coventry, the son, had not sanctioned the application, and, in fact, knew nothing whatever about it. In such circumstances, of course, he could not be justly placed on the list of contributors. The question was, whether the father's name could properly be retained on that list, and this question Mr. Justice Kay answered in the affirmative. After awhile the father died, and the liability which he incurred, as above mentioned, of course devolved upon his executors, whose duty it will now be to satisfy the claim made by the liquidator of the association.—*Chicago Legal News.*

THE PROVINCE OF LAW JOURNALS.—In the valedictory of Austin Abbott, upon his retirement from the editorial chair of the *Daily Register*, N.Y., he says: "During these thirteen years we have watched together through these columns the progress of American jurisprudence, and these current studies of the work of the Courts, of the legislators, and the text-writers have been echoed by our exchanges with many gratifying evidences of their usefulness to the profession at large; and I should not fail to add that I have owed much—and shall in my professional work continue to owe much—to these contemporaries, who are filling so large a place now among the most valued agencies for keeping the profession informed upon the law as it is. The time has gone by when the law can be learned like a matter of ancient history. The records of the past, whether ancient, mediæval, or modern, and whether in text-books, or annals, or reports, can show us nothing more than the roots of the law. The law is not in the books. The books give us what this judge or writer thinks about the law, or did think about it when he wrote. But the law is in the air—it is in the life and force of the community about us, as regulated by the ever-developing judgments of judicial power. The books give us approximate statements. But the original thought and fresh observation of the reader must incessantly verify and test what has been written, and cannot help modifying these records of the past in their application to the controversies of the day. The legal journals of our day are rendering a yet too little recognised service in this respect, and to have co-operated in this service has been a pleasure quite as great as any that my readers have found in what I have put before them."

The Legal News.

Vol. XIII. OCTOBER 25, 1890. No. 43.

Mr. Justice Miller, of the United States Supreme Court, who died from the effects of paralysis on the 13th instant, is an example of a man finding somewhat late in life the profession for which he was specially fitted. Mr. Miller was born in Richmond, Ky., in 1812. His early years were spent upon a farm. Agriculture had no attractions for him, and he sighed for something higher. His ambition or his opportunities were limited at first to a drug store, in which he obtained employment. He then read medicine, and when twenty-two years of age entered upon the practice of medicine in Knox county. From medicine, after some years, he turned to law, and was admitted to the bar in 1847, when thirty-one years of age. Notwithstanding the disadvantage of entering the profession nine or ten years after the usual time, he speedily showed that in this instance change of avocation was not a mistake. In 1862 he was appointed by President Lincoln associate justice of the Supreme Court. Mr. Justice Harlan, one of his colleagues, said of him:—"He had a very bold, aggressive mind, which was shown in his treatment of questions outside of the law. I do not remember any instances since I have been with him upon the bench when he hesitated in the slightest degree to follow out to their legitimate results any conclusions which he ever reached on a question of law. He was not as learned in the books as some judges, but he had a natural aptitude for law. He saw very readily and promptly the real issues of a case and determined them in his own mind without much hesitation. I think that is true in the main, though at times there were questions also on which he expressed doubt. But when, upon reflection, he reached a conclusion that satisfied his own mind, he was prepared to announce it, and stand by it whatever might be the consequences. . . . It is safe to say that no judge in the country has ever delivered a larger number of opinions in cases

involving great constitutional questions. It is also safe to say that, with the exception of Chief Justice Marshall, no American judge has made a deeper impression upon the jurisprudence of this country than he has."

"Essentials of Forensic Medicine, Toxicology and Hygiene," by C. E. Armand Semple, M.D., of London, is a work recently published by W. B. Saunders, Philadelphia, forming one of the series known as Saunders' Question Compenda. Within the space of 196 pages, this treatise gives a clear synopsis of accurate information on a good many subjects useful to the lawyer, especially to one who has cases before criminal courts. There are many things which specially pertain to the medical profession, with which the lawyer must also be conversant in order to conduct the examination of medical witnesses, and to prevent imposition. Thus, the other day, in the *Ansell* case at Quebec, a physician testified to his suspicion that the prosecutrix was feigning epilepsy. We find that feigned epilepsy is one of the subjects noticed in this work. Among the matters treated are personal identity, age, rape, pregnancy, delivery, criminal abortion, infanticide, evidences of live birth, unsoundness of mind, examination of dead bodies, evidence of poisoning and methods of extraction of poison from the dead body, death by hanging, wounds, etc. The portion devoted to hygiene treats of the purity of air and water, and of milk and other foods. The work, which is copiously illustrated, may safely be commended to the reader who has not the time or inclination to master more elaborate treatises.

Mr. Justice Mathew, of the English bench, has recorded his opinion in favour of allowing prisoners to give evidence on their own behalf. In opening Bodmin Assizes, he said there was one change in the law that was clearly demanded by public opinion, and which would, doubtless, be legislated on before long. This was a change that would enable a prisoner to give evidence, if he desired, on his own behalf. It was a singular thing they had been dealing with questions of life and death for centuries without acting

on the maxim of hearing both sides. The proposed change would benefit innocent prisoners, and he doubted if it would be of advantage to the guilty. His Lordship further advocated a Court of Criminal Appeal.

In a recent number of the *Author*, Sir Fred. Pollock criticizes an article on Copyright which had appeared in a previous issue of that periodical. The former writer stated that "literary property is subject to the laws which protect all other property." Sir F. Pollock, in replying, states: "That literary property is recognized and protected by law as something of value is quite true; and probably this is all that the writer meant. But the laws which protect property differ greatly according to the kind of property. Land is not protected in exactly the same way as goods, and a trade-mark and a copyright are again protected by means different from those in use for tangible property, and differing in details from one another. Let not the unwary reader, therefore, imagine that he or she can have a literary pirate dealt with as a thief. Copyright is not, in the legal sense, a thing capable of being stolen." Again: it was asked, "Does anybody take the trouble to secure his copyright in a public lecture?" In reply to this, Sir F. Pollock refers to the well-known case of *Caird v. Sime*, 12 App. Cas. 326.

A correspondent writing to the *Chicago Legal News* records his obligations to that journal, remarking, "in one instance alone a hint obtained from its columns enabled me to obtain a rehearing, and finally win a case in the Supreme Court, and with it a fee of \$3,000 cash, that, but for your journal I should have given up as lost." Similar good fortune has, in several instances, befallen readers of this journal.

COURT OF QUEEN'S BENCH—MONTREAL.*

Tutor—Appeal from Judgment—Authorization—Art. 306, C.C.—Procedure.

Held:—1. That a tutor cannot appeal from a judgment, until he is authorized by the

judge, or the prothonotary, on the advice of a family council. (Art. 306, C.C.)

2. That when an appeal has been taken by a tutor without such authorization, and the respondent moves for the dismissal of the appeal for want of authorization, the Court of Queen's Bench sitting in appeal, may continue the motion to the next term, with leave to the appellant to produce the necessary authorization; and on the production thereof, will permit the authorization to be filed on payment of costs of motion.—*Laforce & Le Maire, etc., de La Ville de Sord, Dorion, Ch. J., Cross, Baby, Church and Bossé, JJ.*, Nov. 16, 1889.

Bank—Powers of—Contract of Guarantee—Ultra Vires.

Held:—That a Bank is not authorized to enter into a contract of suretyship guaranteeing the payment by a customer of the hire of a steamship under a charter party.—*Johansen & Chaplin, Dorion, Ch. J., Tessier, Baby, Church and Bossé, JJ.*, November 20, 1889.

Sale—Latent defect—Redhibitory Action—Art. 1530, C.C.

Held:—1. Where horses, at the time of their sale, were suffering from glanders, but the disease was not sufficiently developed to be apparent until about twenty days afterwards, and the purchaser then notified the vendor of the fact, and that they would be destroyed if not removed within three days: that a redhibitory action instituted four weeks after the sale and delivery was brought with reasonable diligence.

2. That where evidence is conflicting and evenly balanced (as in this case as to the existence of the disease at the time of the sale), the Court of Appeal will not disturb the decision of the Court below.—*Montreal Street R. Co. & Lindsey, Dorion, Ch. J., Tessier, Baby, Church and Bossé, JJ.*, January 22, 1890.

Injury Resulting in Death—Claim of Widow—Prescription—Arts. 1056, 2261, 2262, 2267, C.C.—Verdict—Damages.

The husband of the respondent was injured while engaged in his duties as appellants'

* To appear in Montreal Law Reports, 6 Q.B.

employee, and the injury resulted in his death about fifteen months afterwards. No action for indemnity was instituted by him during his lifetime. In an action for compensation brought by his widow (under Art. 1056, C.C.) within one year after his death, the jury found negligence on the part of appellants, and awarded the respondent damages.

Held: (affirming the judgment of the Court of Review, M. L. R., 5 S. C. 225)—1. That the action of the widow and relations under Art. 1056, C.C., in a case where the person injured has died in consequence of his injuries without having obtained indemnity or satisfaction, is a right distinct from that of the injured person, and is prescribed only by the lapse of a year from the date of death.

2. That the action under Art. 1056, C.C., exists, even supposing that at the date of death the injured person's action was prescribed by the expiration of one year from the date of the injury,—the fact that the claim of deceased was extinguished by prescription at the time of his death not being equivalent to his having obtained "indemnity or satisfaction" within the meaning of Art. 1056, C.C.

3. Where on a former trial the jury awarded the respondent \$3,000 damages, but the verdict was set aside by the Supreme Court on the ground of misdirection, and on the second trial the jury awarded \$8,500 damages: that the amount was not so excessive that the Court should set aside the verdict and order a new trial.—*C. P. R. Co. & Robinson*, Dorion, Ch. J., Cross, Baby, Bossé and Doherty, JJ., June 19, 1890.

Habeas Corpus—Appeal from judgment of the Superior Court—Jurisdiction.

Held:—That the Superior Court and the judges thereof having concurrent jurisdiction with the Court of Queen's Bench in matters of *habeas corpus ad subjiciendum*, there is no appeal to the Court of Queen's Bench sitting in appeal from the judgment of the Superior Court, or of a judge thereof, in such matters.—*La Mission de Grande Ligne et al. & Morissette*, Dorion, Ch. J., Tessier, Cross, Baby, Bossé, JJ., June 26, 1889.

Prescription—C.S.C., ch. 85, s. 3—Negligence.

Held:—1. That the prescription of three months under C.S.C., ch. 85, s. 3, is not applicable where the injury is sustained without the limits of the city or town, though the road be made and maintained by the corporation of the city or town.

2. That a municipality is not responsible for an injury sustained through the imprudence of the person injured; as where a person crossing the ice on the St. Lawrence in winter, deviated from the course marked out by branches, and plunged into an opening in the ice, and was drowned.—*Laforce & Le Muir etc. de la ville de Soré*, Dorion, Ch. J., Tessier, Baby, Church, Bossé, JJ., Jan. 22, 1890.

Sale with suspensive condition—Insolvency of purchaser—Collocation—Privilege—Art. 1998, C.C.

Held:—Where a movable thing is sold with the stipulation that the title shall remain in the vendor until the price shall be entirely paid, and before payment of the price, but more than fifteen days after the delivery of the thing, the purchaser becomes insolvent and makes an assignment; that the vendor is not entitled to be collocated by privilege, for the price of the thing, on the insolvent estate of the purchaser.—*Irving & Chapleau*, Dorion, Ch. J., Tessier, Cross, Bossé, JJ., May 23, 1890.

COUR DE MAGISTRAT.

MONTRÉAL, 10 mars 1890.

Coram CHAMPAGNE, J. C. M.

VINCENT v. SAMSON.

Locataire—Maison fermée—Résiliation—Loyer—Demande.

JUGÉ:—1o. *Qu'un locataire n'a pas le droit de laisser la maison qu'il a louée fermée et non chauffée, et que s'il le fait, c'est une cause de résiliation de bail;*

2o. *Qu'un propriétaire n'est pas tenu d'aller faire la demande de son loyer ailleurs que dans les lieux loués.*

PER CURIAM:—Le demandeur réclame trois mois de loyer échus et demande la résiliation du bail pour défaut de paiement du loyer, et parce que le défendeur n'habite plus la maison qui n'est pas chauffée.

Le défendeur plaide qu'il doit le loyer, offre le paiement, mais sans frais, parce que le demandeur n'en a pas fait la demande avant l'action.

Bien que le loyer soit quérable, le locateur ne peut être tenu de faire la demande que si le locataire reste sur les lieux loués, mais s'il les quitte, il ne peut forcer le locateur à le chercher ailleurs. Quant à la résiliation du bail, celui qui loue une maison pour l'habiter, n'a pas le droit de l'abandonner avant l'expiration du bail, et de la tenir fermée et non chauffée; s'il le fait c'est une cause suffisante pour donner droit au locataire de demander la résiliation du bail.

Jugement pour le demandeur.

Lareau & Brodeur, avocats du demandeur.

A. Rocher, avocat du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTREAL, 10 février 1890.

Coram CHAMPAGNE, J. C. M.

LEPROHON v. ST-GERMAIN, et TARDIF, T.S.

Salaires des journalistes—Compagnon barbier—Insaisissabilité.

JUGÉ:—Que le statut 51-52 Vict., ch. 24 (1888) qui déclare les trois quarts du salaire des journalistes insaisissables ne s'applique pas à un compagnon barbier.*

20. Qu'un tiers-saisi n'est tenu de déclarer que le salaire qu'il doit au moment de la signification d'une saisie-arrest, et non ce qu'il doit au temps où il fait sa déclaration vu que le salaire n'est pas saisissable d'avance.

Le défendeur était un compagnon barbier. Le demandeur ayant pris une saisie-arrest entre les mains de son patron, le tiers-saisi vint déclarer qu'au jour de la signification, il devait soixante-et-dix centins, et que le salaire du défendeur était de \$10 par semaine.

Le demandeur contesta cette déclaration prétendant que le tiers-saisi devait dire ce qu'il devait le jour qu'il a fait sa déclaration et non le jour de l'assignation, ce qui faisait une différence de \$5.

PER CURIAM:—Les gages non échus sont insaisissables excepté dans le cas d'un opera-

rius, et le tiers-saisi ne peut être condamné à payer que ce qui était échu au moment de la signification de la saisie-arrest (C. P. C. 558, § 5). Le défendeur ne tombe pas sous le coup de la loi 51-52 Vict., ch. 24 (1888), 628a C. P. C., n'étant pas un journalier (*operarius*) dans le sens de cet article, qui ne s'applique qu'à l'homme de peine; et le tiers-saisi a intérêt à soulever cette question lorsqu'on veut le forcer à déclarer de nouveau au désir de l'article susdit. (*Becherelle & Bourguignon*, vo. *barbier*; 7 Leg. News, 354).

H. A. Cholette, avocat du demandeur.

H. Lanctot, avocat du tiers-saisi.

(J. J. B.)

DECISIONS AT QUEBEC.*

Pari—Dépôt et retrait d'enjeu—Preuve—Course de chevaux—Arts. 1927, 1928, et 1234, C.C.

JUGÉ:—1. Lorsqu'un pari est fait à la condition que les sommes pariées seront déposées entre les mains d'un tiers, le retrait de son enjeu par l'une des parties, met fin au pari et donne à l'autre le droit de recouvrer du dépositaire ce qu'elle avait elle-même déposé sur son enjeu;

2. Lorsqu'un pari est constaté par un écrit, la preuve testimoniale est inadmissible pour en changer les termes;

3. Tant que le pari n'est pas gagné par l'un des parieurs, la somme déposée en mains tierces ne cesse pas d'être la propriété du déposant, et il peut la retirer;

4. Le pari pour courses de chevaux ne donne pas droit d'action pour le recouvrement de deniers ou autres choses pariées.—*Swift v. Angers*, en révision, Casault, Routhier, Andrews, JJ., 31 mars 1890.

Cession de biens—48 Vict. ch. 22—Saisie-gagerie—Action par créancier contre curateur.

La femme de l'intimé, marchande publique, ayant fait cession de biens pour le bénéfice de ses créanciers, l'intimé produisit entre les mains de l'appelant, nommé curateur, une réclamation de \$1,500, pour loyer du magasin occupé par la faillie. Quelques mois plus tard le curateur, dûment autorisé, vendit le fonds de commerce, et comme l'acheteur en prenait possession, l'intimé le fit sai-

* Le 11 décembre 1889, *re Germain v. Ducharme et Sabourin*, la Cour de Magistrat (Champagne, J.) a décidé que le même statut ne s'appliquait pas à un commis.

sir pour loyer susdit, par bref de saisie-gagerie adressé au curateur es qual. et à l'acheteur mis en cause. Défense en droit de la part de l'appelant.

Jugé.—Que l'appelant était, en sa qualité de curateur, légalement en possession des dits biens, pour en disposer et en distribuer le produit entre les créanciers, et l'intimé n'avait aucun droit de les saisir-gager ni de poursuivre l'appelant pour sa créance; la loi relative à la cession de biens lui ayant conservé le droit de produire sa réclamation entre les mains de l'appelant pour être payé selon et d'après le rang de ses droits et privilèges sur le prix des dits meubles.

Lorsqu'un marchand insolvable a fait cession de ses biens pour le bénéfice de ses créanciers, et qu'un curateur a été nommé, un créancier du failli ne peut poursuivre le curateur et le déposséder des biens dont la loi lui a confié la garde et l'administration dans l'intérêt de tous les créanciers en général.—*Bédard & Lemieux*, en appel, Dorion, J. C., Cross, Baby, Church, Bossé, JJ., 7 fév. 1890.

Servitude—Droit de passage—Barrière—Art. 557, C. C.

Jugé.—Le propriétaire du fonds servant, sur lequel est établie une servitude de passage, a le droit, en clôturant ce fonds, de mettre au passage une barrière qui ouvre et ferme facilement.—*Royer v. Lachance*, en révision, Casault, Routhier, Caron, JJ., 30 avril 1890.

Listes électorales, P. Q.—Appel au juge de la Cour Supérieure—Employés du gouvernement—S. R. Q. arts. 206, 207, 176—52 Vict. ch. 6.

Jugé.—1. L'appel au juge de la Cour Supérieure des décisions des conseils municipaux au sujet des listes électorales, donné par l'art. 206 des S. R. Q., ne peut être pris que lorsque ces décisions sont rendues sur des plaintes produites au bureau du secrétaire-trésorier dans les délais voulus;

2. Les personnes employées à la journée au chemin de fer Intercolonial par le gouvernement de la Puissance, et qui peuvent être renvoyées à la fin de chaque jour sans raison ni excuse, ne tombent pas sous le coup de l'art. 176 des S. R. Q. amendé par la 52

Vict. ch. 6, s. 2, qui enlève le droit de vote à ceux qui occupent une position "salarisée et permanente" sous les gouvernements de la Puissance du Canada ou de cette province.—*Beaumont v. Corporation de Lévis*, C. S., Casault, J., 4 mai 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

§ 193. What is a representation?

A representation in insurance is either by writing¹ or by *parol*, and is a communication before or at the time of effecting an insurance as to facts and objects which may determine the will of the insurer. Sometimes it is an affirmation of some past or existing fact, sometimes a mere statement of expectation, intention or belief. A representation is said to be *material*, when it communicates any fact or circumstance which may be reasonably supposed to influence the judgment of the underwriters in undertaking the risk, or calculating the premium; and whatever may be the form of expression used by the insured or his agent in making a representation, if it have the effect of imposing upon or misleading the underwriter, it will be material, and fatal to the contract.

A positive representation in a material point is essentially a warranty, says Kent, though not inserted in the policy.

Representations (says Duer) relate either to facts, information, or, lastly, to intentions, expectation, or belief of the assured.

§ 194. How distinguished from a warranty.

There is no difficulty in distinguishing a representation from a warranty, the former being part of the preliminary proceedings², (something before the subscription to the policy and delivery of it); while warranty is part of the contract as it has been completed.³

¹ It may be inserted in the policy, Kent, p. 282.

² According to Duer, it may be in the policy.

³ Angell, § 147 a.

Representations, though in writing, said Lord Mansfield, in *Bize v. Fletcher*, hold less than a warranty.

There is this material difference between a *representation* and a *warranty*—a *warranty* is always a part of the written policy, and must appear upon the *face* of it; but a *representation* is only a matter of collateral information on the subject of the insurance, and makes no part of the policy. A *warranty* must be *strictly* and *literally* complied with; but it is sufficient if a *representation* be *substantially* correct. An *untrue* representation is not in itself a breach of the contract (although by the terms of the contract it may become so), but if the untrue representation be *material*, it will in itself avoid the policy either on the ground of *fraud*, or because it has misled the insurer. (1 Park, 285, 7th ed.) Duer differs; lect. xiv.

When a man is asked how old he is, and he says thirty, though he be fifty, as he is thirty and more, it may be said he answers not untruly. Yet, it must be held that the answer is not true.¹

Suppose the insured is asked: State the highest rate of premium ever paid by you for insurance of this same subject. If he answer falsely, it will be held a false representation in matter essential; falsely inducing undue confidence, the insured must not gain. The policy is null. So held on appeal in Scotland in 1814. Vo. "Fraud," Shaw's Digest.

§ 195. Effect of insurer's knowledge of a fact.

Will the insurer's knowledge about a fact save the insured from the accusation of representing facts untruly, where the insurer's knowledge aided him to see the exact position of things?

Will knowledge of the agent be held that of the insurer, and estop him? It was held in the affirmative in *Rowley v. Empire Ins. Co.*² In this case the agent filled up blanks in the application, and it contained a material misrepresentation not authorized by the applicant; it was held the act of the company, and so it was held in *Drury v. Conway Ins. Co.*³

*Insurance Co. v. Wilkinson*¹ was a life insurance case. The age of the mother of insured was not given by him, except as he got it from the insurer's agent, who got it from some other source, and his report of it was adopted by the applicant and stated in the application, and it was untrue in fact.

If the insured be misled by the insurers he is not to suffer, *Newcastle F. Ins. Co. v. Macmoran*, 3 Dow, 255; *Hartford Prov. Ins. Co. v. Harmer*, 3 Bennett.

Parol evidence is admissible to show that description annexed to a policy was drawn by the agent of the insurer. P. 408, 2 Sup. Ct. R. of Ca.

In *Harris v. Queen Ins. Co.*,² the plaintiff sued as executor upon what is called an "indisputable" life policy which had been effected by his testator, the deceased. The company set up a misstatement by the assured as voiding the policy. The plaintiff replied that the company published to the assured advertisements containing this statement: "A Queen's life policy is unchallengeable, except on ground of fraud." The Court held the company bound by their advertisements, and gave judgment for the plaintiff.

§ 196. Different kinds of representations.

Representations are divided into promissory and others.³

§ 197. Substantial compliance.

The representation that ashes are kept in brick is sufficiently complied with, if they be kept in iron, or equally safe mode of deposit. So the representation that casks of water with buckets are kept in each story, though untrue, if a reservoir be at the top of the house with pipes from it to each story, if found by skilled persons equally efficacious, it would be a substantial compliance, says Angell, 158.

Arnould and Duer are directly at variance in regard to the nature of a representation, and its connection with the contract of insurance. Arnould maintains, and the other English writers on insurance are of the same opinion, that a representation is *collateral* to

¹ *Cazenove v. Br. Eq. Ins. Co.* Jurist of 1860,

² 36 N. Y.

³ 13 Gray.

¹ 13 Wallace R.

² Queen's Bench (Eng.), 1864.

³ Query: Are promissory representations anything else than warranties?

the contract, and invalidates the policy only on the ground of fraud upon the insurer. But he holds that the fraud required is not moral, but simply *legal* fraud; it is sufficient if the insurer is misled, even by an innocent mistake of the other party, this constituting a fraud in contemplation of law. 1 *Arnould on Ins.*, 495. Duer, on the other hand, insists with his accustomed force and clearness, that every positive representation, is a part of the contract of insurance, though not inserted in the policy; and that its substantial correctness is thereby made a condition precedent, on which the validity of the policy depends; that a representation is equivalent to a warranty, except in regard to the strictness of fulfilment required; "that where there is no actual intention to deceive, there is no other fraud than exists in every case where a party relies on a promise that is not fulfilled;" and that, therefore, the effect of an innocent misrepresentation in invalidating a policy, cannot be on the ground of fraud, but on account of the non-performance of a condition precedent. *Duer on Ins.*, Vol. 2, Lect. 14, p. 653.

Concealment must be of something that the party concealing was bound to disclose. A, wishing to insure, is asked by one office 50s. He goes to another that offers to insure him at 25s. A is not bound to say that the other asked 50s.¹

Where the insured said so-and-so was the highest premium he had ever paid, and this was false, and induced undue confidence, the Supreme Court of Scotland reversed the original judgment, which held that representation not essential to the policy. 1 *Bell*, 619.

If one party conceals or misrepresents, but the other discovers everything and the truth, and then both sign the contract, concealment or misrepresentation will be in vain urged.² *E. G.*—A being asked if he has proposed elsewhere, and what was asked, says: "Yes, and they asked 30s." The company enquires and finds that they asked 50s.

But by the forms of pleading, it is seen

that every action for the breach of a promise is founded upon *legal* fraud, and it is always so charged in the declaration. Therefore, inasmuch as insurance is a contract of a peculiar nature, entirely on speculation, and *ultramarine fidei*, it would seem that the slightest fraud is sufficient to defeat it, and that anything which the law terms fraudulent will produce that result.

Mr. Phillips' doctrine is that "it is an implied condition of the contract of insurance, that it is free from misrepresentation or concealment, whether fraudulent or through mistake." 1 *Phillips, Ins.*, 287.

Art. 2487, C.C. of L.C., says that concealment, either by error or design, of any fact of a nature to diminish the assurer's appreciation of the risk, is a cause of nullity.

No point in the law of insurance is better settled than that, in every case of misrepresentation of existing facts material to the risk, the insurer is not liable for an injury to the property insured, though it has no connection with the fact misrepresented, but is owing entirely to another cause. This is on the ground that the insurer has been misled by the misrepresentation, and would, if the fact had been truly stated, either have declined the risk entirely, or demanded a larger premium. But the case of *Stebbins v. Globe Ins. Co.*¹ denies the applicability of this doctrine to *promissory* representations, and holds that the material increase of the risk by a breach of a representation of that character constitutes in itself no defence for the insurer, but that he must also show that but for its non-fulfilment, the loss would not have occurred.

The case referred to was an action on a policy of insurance against fire, and the facts material to the point in question were these: The plaintiff's application for insurance, after giving a general description of the property, referred for particulars to a diagram annexed thereto. On this diagram the space in the rear of the buildings on which insurance was requested was marked *vacant*. After exhibiting the diagram, the defendants offered to prove that after the insurance was effected, and during the continuance of

¹ Argument from judgment of Lord Brougham in 1850, in *Irvine v. Kirkpatrick*, 3 E. L. and Eq. R.

² Per Lord Brougham, *ib.*

¹ 2 Hall, 632.

the risk, the plaintiff had erected other buildings on the ground marked *vacant*, and immediately contiguous to the premises insured, and that the risk was thereby increased. But the Court rejected the evidence, unless the defendants meant to show that the intention of the plaintiff at the time of effecting the insurance, was to erect these buildings, and that he had concealed that intention, or that the fire was occasioned by or originated in the adjacent buildings so erected. The defendants appealed to the Superior Court of the City of New York, where, however, the decision of the Court below was affirmed. This case is referred to, and a similar decision made in *Gates v. Madison Co. Mut. Ins. Co.*¹ Is this sound? Is a man bound to keep *vacant* land?

Sometimes French companies' conditions allow them to cancel, in any case of fraud, all policies existing.

It will be observed, that by this doctrine, the effect of *promissory representations*² in invalidating the policy is not *entirely denied* as in *Alston v. Mechanics Mut. Ins. Co.*, but limited in an important particular. There appear to be no other cases in the reports where the same doctrine is maintained, neither is it recognized by any of the writers on insurance. Indeed, it seems to be opposed to the general principles governing that branch of the law, and to work an entire change in the mode of construing representations, whether affirmative or promissory. If, as has been before stated (and in regard to this the decisions leave no room for doubt), a representation of the occupation of a building, or the national character of a ship, means not only that such is the fact at the time the statement is made, but also that it will continue substantially so during the risk, it is difficult to see why a representation of the situation of the property insured in regard to other buildings, being a matter equally material to the risk, should not receive as broad a construction.

¹ 1 Selden, 409.

² What are promissory representations? Nothing but warranties after all. Where they are held by Duer to be warranties, are they not so in substance? Take the case in 1 Campb., for instance. It would be more correct to say, representations are not generally warranties, but may be so, when involving promise for future conduct.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 18.

Judicial Abandonments.

Adjutor Bernier, stationer, Levis, Oct. 14.
Widow Joseph Côté, St. Roch de Québec, Oct. 8.
F. X. L. Mercier, painter, St. Joseph de Levis, Oct. 14.

Curators appointed.

Re F. X. Billy, Arthabaska Station.—Kent & Turcotte, Montreal, joint curator, Oct. 15.
Re Armand Boyce.—Henry Miles, Montreal, curator, Oct. 13.
Re J. L. Laurier.—Bilodeau & Renaud, Montreal, joint curator, Oct. 15.
Re Damase A. Morin, Fraserville.—H. A. Bedard, Quebec, curator, Oct. 10.
Re Auguste Perron, Quebec.—D. Arcand, Quebec, curator, Oct. 13.
Re Wm. Sipling.—F. W. Bury, Montreal, curator, Oct. 15.
Re George Woods, trader, Montreal.—J. U. Faucher, Montreal, curator, Aug. 29.

Dividends.

Re Beaudet & Chinic, Quebec.—Third dividend, payable Nov. 4, D. Rattray, Quebec, curator.
Re Duncan Campbell & Son, Montreal.—Second and final dividend, payable Nov. 3, A. F. Riddell, Montreal, curator.
Re Charles Lemire.—First and final dividend, payable Oct. 25, Bilodeau & Renaud, Montreal, joint curator.
Re Albert Manseau, Plaisance.—First and final dividend, payable Nov. 4, C. Desmarteau, Montreal, curator.
Re Montreal Moulding & Mirror Manufacturing Co.—Second and final dividend, payable Nov. 4, A. F. Riddell, Montreal, liquidator.
Re Miss H. Mousseau.—First and final dividend, payable Oct. 25, Bilodeau & Renaud, Montreal, joint curator.
Re Louis Robert.—First and final dividend, payable Oct. 25, Bilodeau & Renaud, Montreal, joint curator.
Re Wm. Rourke.—First dividend, payable Nov. 3, J. N. Fulton, Montreal, curator.
Re Narcisse Thérout, St. David.—First and final dividend, payable Nov. 4, C. Desmarteau, Montreal, curator.

Separation as to Property.

Clara Nadon vs. Jean Baptiste Lalumière, Montreal, Oct. 9.
Ellen H. O'Brien vs. Charles N. Trudeau, blacksmith, Oct. 11.
Georgiana Paradis vs. Joseph N. Massicotte, tin-smith, Farnham, Oct. 7.

The Legal News.

VOL. XIII. NOVEMBER 1, 1890. No. 44.

In the case of *Cox v. Hakes*, the House of Lords decided, Aug. 5, that the Court of Appeal in England had no jurisdiction to hear an appeal from the granting of a writ of *habeas corpus*. The Queen's Bench division made absolute a rule for a *habeas corpus*. The Court of Appeal reversed this order. Then an appeal was taken to the House of Lords. The arguments were confined to the question whether any appeal lay from an order granting a writ of *habeas corpus*. The case was twice argued. The first hearing took place before the Lord Chancellor (Halsbury), Lords Fitzgerald, Herschell and Macnaghten, the argument occupying part of three days. Nearly a year afterwards the case was re-argued before the Lord Chancellor, and Lords Watson, Bramwell, Herschell, Macnaghten, Morris and Field, when after a long *délibéré* the judgment of the Court of Appeal was reversed, Lords Morris and Field dissenting. This case has some resemblance to *Mission de la Grande Ligne & Morissette*, M. L. R., 6 Q.B. 130.

On the question of damages, which is so frequently coming up, it may be useful to refer to the recent case of *Praed v. Graham*, 59 Law J. Rep. Q.B. 230. The action was for libel, and the jury had awarded £500. The High Court, and subsequently the Court of Appeal, refused to order a new trial for excess of damages, Lord Esher, M.R., enunciating the rule as derived from the authorities to be that, if the damages are so large that no reasonable men ought to have given them, the Court ought to interfere, but otherwise not. In the twentieth chapter of the fourth edition of 'Mayne on Damages' (says the *Law Journal*) all the authorities will be found collected, and it will appear from a perusal of them that the rule of *Praed v. Graham* is not limited to cases of libel or even to cases of tort, but includes cases of breach of contract also, where, as in an action for

breach of promise of marriage, exact calculation is impossible. 'The case must be very gross, and the damages enormous, for the Court to interpose,' it was said by Mr. Justice Yates one hundred and twenty years ago in *Bruce v. Rawlins*, 3 Wils. at page 63, where the jury gave £100 in an action for trespass, though 'very little or no damage was done;' and the judgment in *Praed v. Graham* is merely a repetition of the same rule in different words.

SUPERIOR COURT—MONTREAL.¹

Libel—Candidate for election to the legislature—Charge of being a Freemason or Orangeman—Damages.

Held:—1. That when a person is offering himself for election to the legislature, newspapers have a right, in the public interest, to state the truth respecting his character and qualifications; and therefore a statement, true in itself, that a candidate is a Freemason is not ground for an action of damages.

2. A term not injurious in itself may become injurious from the intent of the writer or speaker in its application. Hence to allege falsely of a candidate for election to the legislature, that he is an Orangeman, in a community where Orangism is held in detestation by a large proportion of the people, is an *injure*, and under Art. 1053 C.C., gives rise to an action of damages.

3. As to the amount of damages, no substantial damages being proved, the Court of Review reduced the amount from \$500 to \$100, with full costs of suit.—*Noyes v. La Cie. d'Imprimerie et de Publication*, in Review, Johnson, Ch. J., Wurtele, Davidson, JJ., May 31, 1890.

Simulated sale—Deed intended to operate as pledge of effects to creditor as security for advances.

A manufacturer of farming implements obtained advances to buy machinery which was placed by him in a building belonging to him. He then made a sale of the machinery to the person who furnished the ad-

¹ To appear in Montreal Law Reports, 6 S.C.

vances, with right of redemption within two years. He did not exercise this right of redemption within the stipulated time, but remained in possession of the machinery.

Held.—Following the decision of the Privy Council in *Cushing & Dupuy*, 3 Leg. News, 171; 24 L. C. J. 151, That the deed did not constitute a real sale, the object of the deed being merely to pledge the effects to the creditor as collateral security for the advances, which pledge, not being accompanied by delivery, was without effect, and the creditor, therefore, was not entitled to oppose the seizure of such effects at the instance of a judgment creditor.—*Chevalier v. Beauchemin*, in Review, Johnson, Ch. J., Tait, deLorimier, JJ., Feb. 28, 1890.

Sale—Suspensive condition—Third party purchasing in good faith a thing which does not belong to the seller.

Held.—Where the sale of a movable is made with a suspensive condition, and it is stipulated that the purchaser shall not have any title in the thing sold until the condition shall be performed—as where a subscription is obtained to a book, deliverable in volumes, and the price is payable in monthly instalments as the work is delivered, and it is stipulated that the purchaser shall have no property in the book until the price shall have been wholly paid—the vendor has a right to revendicate the volumes delivered, in default of payment as stipulated, even in the possession of a third party who has acquired the same in good faith and for valuable consideration, unless the circumstances be such as validate the sale of a thing not belonging to the seller.—*Canadian Subscription Co. v. Donnelly*, in Review, Johnson, Ch. J., Wurtele and Davidson, JJ., May 31, 1890.

Action pétitoire par la Couronne—Impenses et améliorations—Rétention—Réponse en droit.

Jugé.—Que dans une action pétitoire intentée par la Couronne, le défendeur ne peut réclamer le droit de retenir la propriété jusqu'à ce que le gouvernement lui ait payé ses impenses et améliorations. *Thompson v. Desmarceau*, Tait, J., 30 sept. 1890.

Saisie-arrest avant jugement—Admission—Preuve.

Jugé.—Dans une contestation de saisie-arrest avant jugement, lorsque le contestant dans ses réponses aux articulations de faits a, pour éviter à frais, admis qu'il devait au demandeur plus de \$5, le demandeur peut néanmoins, faire la preuve de sa créance.—*Mallette v. Ethier*, Mathieu, J., 18 sept. 1890.

Cession de biens—Curateur—Vente des immeubles—Shérif—Protonotaire—Distribution des deniers.

Jugé.—1o. Que la distribution des deniers provenant de la vente par le shérif, en vertu d'un mandat du curateur, des immeubles cédés en justice par un débiteur pour le bénéfice de ses créanciers, doit être faite par le curateur;

2o. Que, par analogie, ce mode de faire la distribution des deniers doit aussi s'appliquer au cas où une saisie d'immeubles a été pratiquée avant, mais où la vente a été faite après la cession judiciaire.—*Baker v. Gariépy*, Wurtele, J., 22 juillet 1890.

COUR DE MAGISTRAT.

MONTRÉAL, 10 septembre 1889.

Coram CHAMPAGNE, J. C. M.

MAILLET v. FONTAINE et FONTAINE, opposant.

Opposition à jugement—Affidavit—Insuffisance—Renvoi sur motion.

JUGÉ.—Qu'une opposition à jugement dans laquelle les raisons qui ont empêché de plaider originellement ne sont pas données, dans laquelle l'affidavit est général, et qui n'a pas été reçue par un juge, est irrégulière, informe, illégale, et doit être renvoyée sur motion.

Voir 52 Vict., ch. 49.

Opposition renvoyée.

David, Demers & Gervais, avocats du demandeur.

A. A. Laferrière, avocat de l'opposant.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, 25 novembre 1889.

Coram CHAMPAGNE, J. C. M.

GRAHAM v. DAME CHANTIGNY.

Demande de paiement—Légataire universel.

Jurat:—Que la demande de paiement exigée par la loi une fois faite est suffisante et n'a pas besoin d'être faite de nouveau, après le décès du débiteur, à son légataire universel.

PER CURIAM:—Le demandeur réclame de la défenderesse, comme légataire universelle de son défunt mari, le montant d'un compte de marchandises dû par ce dernier.

La défenderesse plaide que demande de paiement ne lui a jamais été faite avant l'action, et offre de payer sans frais.

Mais il est prouvé que la demande de paiement a été faite au mari, et il n'était pas nécessaire de renouveler cette demande à la défenderesse légataire universelle de son mari.

Jugement pour le demandeur.

Marceau & Lancot, avocats du demandeur.

Chauvin & Chauvin, avocats de la défenderesse.

(J. J. R.)

SUPREME COURT OF MINNESOTA.

JULY 1, 1890.

MOORE v. RUGG.

Photographs—Use of negatives.

Where A employs a photographer to make and sell to him a number of photographs of himself, there is by implication an agreement that the negative for which A sat shall only be used to print such portraits as A may order or authorize.

COLLINS, J.—The complaint in this action is not a model, as is admitted by the attorney who drew it, but it appears therefrom that defendant, a photographer, had been employed to make, and had made and sold to plaintiff, a number of photographic portraits of herself; and that subsequently, without the order or consent of plaintiff, he made and delivered to a detective another of these photographs, who used it in a manner particularly stated in the pleading, and claimed to have been highly improper. In justice to defendant, it is right that we should here remark that it is nowhere averred in the complaint that the occupation of the detective was known to him, or that he knew that the photograph so delivered was to be used in the manner stated in the complaint,

or in any other improper way. This action was brought to recover damages, and this appeal is from an order overruling a general demurrer to the complaint.

A good cause of action was therein stated, for which nominal damages, at least, may be recovered. The object for which the defendant was employed and paid was to make and furnish the plaintiff with a certain number of photographs of herself. To do this a negative was taken upon glass, and from this negative the photographs ordered were printed. An almost unlimited number might also be printed from the negative, but the contract between plaintiff and defendant included, by implication, an agreement that the negative for which plaintiff sat should only be used for the printing of such portraits as she might order or authorize: *Pollard v. Photographic Co.*, 40 Ch. Div. (C. D.) 345. The complaint shows that there was a breach of this implied contract.

Order affirmed.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

[Continued from p. 344.]

There was, therefore, in the case under consideration (and this is acknowledged by Judge Oakley, in his opinion), an implied stipulation or promise on the part of the insured, that the situation of the premises with respect to the adjacent buildings should not be changed by any act of his so as to increase the risk, or, in other words, that the ground marked *vacant*, should remain so; the insurers must have relied upon this stipulation in fixing the rate of premium; and the contract is necessarily avoided by its non-fulfilment, whether it is put on Arnould's ground of *legal fraud*, or on that of Duer, that the representation is a part of the contract, and its performance a condition precedent to the validity of the policy. It seems, therefore, that the question whether the loss is occasioned by the fact misrepresented, has nothing to do with the liability of the insurer, but that the sole inquiry must be

was the misrepresentation material to the risk? But see the case of *Howard v. Kentucky & Louisville Mut. Ins. Co.*, decided in the Supreme Court of Kentucky, and reported in *Am. Law Reg. for Sept. 1853*, p. 686, where the decision in the case of *Stebbins v. Globe Ins. Co.* is approved.

§ 198. *Proof of Representations Inconsistent with Policy Not Admitted.*

Though, as has been already seen, proof of the representations of the insured is sometimes admitted for the purpose of affecting or varying the construction of the policy, this is never the case when the representations and the policy are contradictory of, and inconsistent with each other. In a case like this, the general rule applies, and the policy is considered the sole evidence of the actual agreement.¹

In 2 Hall, verbal representation of an agent of the insured was attempted to be proved, to restrain a policy; the evidence was excluded, the Court saying that the terms of the policy were clear, and could not be waived by such frail proof. But if it be more comprehensive in favor of the insured, he will get the benefit of it. However, *Bize v. Fletcher* did not judge that expressly. The defendants did contend that a slip of paper wafered to the policy, and containing a written representation by the insured, restrained the voyage. It did not, but it might have done so. Were a policy not clear, a representation like that ought to bind the insured.

§ 199. *Statement Not Material to the Risk.*

If a false statement be made, but not material to the risk, or if the risk be less, the insurers must pay; as if a man, whose house is covered with tin, describe it as covered with wood, the insurers must pay.

There is no difference between marine, fire or life insurance in regard to the construction of representations. The rule is, that so far as they are material to the risk, they must be substantially fulfilled. If the insurer has

relied upon them, and has thereby been induced to enter into a contract which he would otherwise have declined, any material want of truth in them will render invalid the policy based upon them. It is not necessary that the misrepresentations should be *intentionally* made; they may be the result of mistake, accident or inadvertence, on the part of the insured, and still be binding upon him. It is enough that the insurer has been misled, and though no fraud was *intended* by the assured, it is nevertheless a fraud upon the insurer, and avoids the policy. But a misrepresentation of an *immaterial fact* will not generally vitiate the contract.¹ Thus it has been held, that where the interest of the insured in the subject matter of the contract is a qualified, conditional, temporary, or equitable one, a description of the property by him as "his," or a representation that he is the owner of it, is not such a misrepresentation as will avoid the policy.²

Representation of facts, so far as material to the risk, must be true; *per* Story, J., in *Hazard v. N. E. Maine Ins. Co.*, 1 Sumner. But, in all such cases, facts of, 1st, truth of representations, 2nd, materiality, are for the jury. *Id.*

The meaning of a representation is to be that of the place where made, as New York, if the insurance be after correspondence and in favor of a New York man by a Boston company, though the policy be dated Boston.

Story thought otherwise in the *Hazard* case,³ but this part of his judgment was reversed.⁴

Duer says that promissory representations, though not written, but proved by parol, and though made in good faith, must be complied with, else *actio non*.⁵

¹ *Stetson v. Mass. Mut. Fire Ins. Co.*, 4 Mass., 330; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Curry v. Commonwealth Ins. Co.*, id. 535; *Farmers' Ins. Co. v. Snyder*, 16 Wend. 481.

² *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Curry v. Commonwealth Ins. Co.*, id. 535; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. 419; *Tyler v. Etna Ins. Co.*, 12 Wend. 507; *S. C.*, 16 id. 385. But see *contra*, *Columbian Ins. Co. v. Lawrence*, 2 Peters, 25; and also this point further considered *post*.

³ 1 Sumner.

⁴ See 8 Peters.

⁵ *Allop v. Coit*, 12 Mass.

¹ *Bize v. Fletcher*, Douglas, 271; *N. Y. Gas Light Co. v. Mechanics' Fire Ins. Co.*, 2 Hall, 108. Babington on Auctions, p. 21, shows the evil of admitting proof of representations before the policy.

If the description be substantially untrue in a point material to the risk (though only in a representation), the misrepresentation will discharge the insurers, *though the loss happened not from any fact suppressed or misrepresented*; *per* Story, J., in the *Hazard* case.

An insurance company, if defrauded out of a policy, can sue to get the policy cancelled.¹

Where there are *several policies*, representations made to the first insurer cannot, in fire insurance generally, be proved; certainly not where such proof would be inapplicable to any issue. This was so judged, as to questions to Lunn, in *Grant v. Aetna*. But if the plea specially alleged that there were several insurances,—that the first one was obtained by fraudulent representations, that these representations were communicated to the second insurer, and led him to take a risk that he was so defrauded, probably questions as to the original false representation being pertinent to an issue would be admitted.

The rule of 2 Campb., R. 544, is unsatisfactory. Yet, in 5 Duer's Rep. is a case of fraud in a loan by A from B, in which B was allowed to prove A's fraud and false representations *before* the loan, and that he made like false statements to others as he made to B; from which others he had tried to procure the loan.

Sometimes the actual state of the title, and the peculiar character of the interest of the insured, may, from the nature of the case, be material, and a misrepresentation in regard to them will, therefore, be fatal to the policy.

Thus where one insured by a mutual insurance company, which, by its charter, was entitled to a lien upon all property insured by it, represented himself as the owner of the building insured, when, in fact, he had merely a bond for a deed of it upon conditions which had not been performed, the court held that this was a material misrepresentation which invalidated the policy, because the actual state of the title was such that no lien could be acquired, but at the same time, they expressed the opinion that

it would have been otherwise in such companies as were not conducted upon the mutual system.¹

But if a fact usually immaterial, like the actual state of the title to the property insured, for instance, be specifically inquired about by the insurer, it will be considered material, and a substantial misstatement in regard to it will avoid the policy; for it is not to be presumed that the party would make such inquiries unless he had supposed the fact material, and hence by a false answer he will be misled, and induced to make a contract which he would otherwise have declined.²

It is, therefore, seen that the materiality of the representation to the risk need not be absolute, that is, it need not affect the value of the risk considered in itself. The materiality required, on the contrary, is relative, and its test is its influence upon the insurer. Therefore, although a representation is really immaterial to the risk itself, and would perhaps generally be so regarded, still if it can be shown to have influenced the mind of the insurer, and induced him to take the risk, its falsity will avoid the policy.

Thus, if an applicant for insurance falsely represents the rate he has paid other insurers on the same property, and thereby induces one to take a risk which, but for such representation, he would have declined, he will not be allowed to prove that the representation was in reality immaterial to the risk assumed.³

§ 200. *Statement as to Belief, Expectation or Intention.*

An expression of the belief, expectation, or intention of the insured, is not a representation that the fact or thing believed, expected or intended, either actually exists or will certainly occur, but it refers solely to his mental condition at the time it was made, and will not affect the policy, unless the purpose of making it was to deceive the

¹ *Brown v. Williams*, 15 *Shepley*, 252; *Smith v. Bowditch Mut. Fire Ins. Co.*, 6 *Cushing*, 448; *Mahon v. Mut. Ass. Co.*, 5 *Call* (Va.) R. 517.

² *Burritt v. Saratoga Mut. Fire Ins. Co.*, 5 *Hill*, 192; *Davenport v. N. E. Fire Ins. Co.*, 6 *Cushing*, 340.

³ *Sibbard v. Hill*, 2 *Dow*, 263.

¹ *Hoare v. Brembridge*. L. R., Eq. 522, A.D. 1872-3.

insurer.¹ And see, *post*, *Notman et al. v. The Anchor Ins. Co.*

Every affirmation of a fact written in the policy is a warranty—but when the statement relates not to facts but to expectations or belief, it can't be thus construed, says Duer, *lect. XIV.*

In the case of *Kimball v. Aetna Ins. Co.*,² the policy issued on a dwelling house (in consequence of a promise that it would be occupied). A condition of the policy was that, "if in any written or verbal application for insurance the assured makes an erroneous representation, materially increasing the risk, the company not to be liable."

The insured had said: "The house would be occupied; that he had a man in view who was going to occupy it." The promise was not carried out, the house remaining empty. The insurance company cited: 1 Duer, *Ins.* 657, 665, 721, 749, etc.; 1 *Phill. Ins.* § 553. *Edwards v. Footner*, 1 *Camp.* The insured cited *Bryant v. O. Ins. Co.*, 22 *Pick.*, etc. It was held that failure to carry out promise, (no fraud being proved) did not avoid the policy, though the risk was increased. This case (says Gray, J.) has been controverted and criticized; but is well founded, and supported by judgments in England and the United States. Oral representation as to a future fact honestly made can have no effect. It is mere statement of an expectation; subsequent disappointment will not prove it untrue.

Dennistown v. Lillie, 3 *Bligh*, is the strongest case showing that an oral representation promissory may be set up to defeat a written policy; but examination will show that the representation in this case was in no sense promissory, or relating to anything after execution of the policy. The representation was an untrue statement of a past fact. The vessel had sailed, 23rd April, and yet it was represented that she was to sail at 1st May, a future date. She was lost shortly after the date at which she was stated as "to sail."

At the worst, all that could be said against

Kimball was that he was bound to occupy in a reasonable time (*per Gray, J.*)¹

Intention expressed the insured may depart from, says Duer; but he ought to give some evidence of good faith, says Duer. But query, and see generally *Warranty, post.*

If mere intention by the assured be stated, the risk of change of intention is on the insurer. 3 *Kent, Comm.* (284.) See also 2 Duer.

Positive representations of future facts material to the risk will, if false, avoid the policy, *Arnould*, p. 509.

It has been contended by an able jurist, that there is no such thing as a promissory representation. See opinion of Chancellor Walworth in *Alston v. Mechanics' Mut. Ins. Co.*, 4 *Hill* 329.

SOME SCOTTISH JUDGES.

In a sketch of "The College of Justice and its Members," the London *Law Journal* has the following about Lord Rutherford Clark:

Lord Rutherford Clark is the son of the late Rev. Thomas Clark, D.D., Edinburgh. He was admitted to the Scotch bar in 1849, rapidly gained a professional status similar to that which Mr. Baron Huddleston held in the days of his forensic eminence, was sheriff of Inverness, Haddington, and Berwick successively, Solicitor-General for Scotland and Dean of the Faculty of Advocates, and then took his seat in the Second Division of the Inner House.

We have passed thus hurriedly over those facts in the life of Lord Rutherford Clark, which are accessible to everybody, in order that we might have space to deal with the two most important, yet least widely known, events in his career—his defence of Jessie MacLachlan in 1862, and his defence of Dr. Pritchard in 1865. The *Sandyford Murder Case* is one of the *causes célèbres* of Scotland. On the night of July 7, 1862, Jessie Macpherson, the housekeeper of a Mr. Fleming, an accountant, residing in Sandyford Place, Glasgow, was murdered in her bedroom with a hatchet or cleaver. Her dead body was

¹ *Cutlin v. Springfield Fire Ins. Co.*, 1 *Sumner*, 434; *Bryant v. Ocean Ins. Co.*, 22 *Pick.* 200.

² 9 *Allen's Rep.* Jan'y. 1866.

¹ *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, is disapproved by Gray, J. In this case the declaration of an intention to do an act materially affecting the risk was treated as an engagement to do it.

found next morning lying on the bedroom floor, and so mangled that it was evident she had offered a desperate resistance. Mr. Fleming and his family were at the seaside, and the only inmates of the house at the time when the murder was committed were his father, an old man eighty-seven years of age, and Mrs. Jessie Maclachlan, who before her marriage had been a servant to the Flemings, and who was on the most friendly terms with the deceased. At first suspicion fell on old Mr. Fleming, and he was arrested and imprisoned. But it was soon discovered that certain silver plate which belonged to the family, and which had been missing since the fatal night, had been pawned by Mrs. Maclachlan under the *alias* of Mary Macdonald. Mr. Fleming was at once released and 'precognosed,' after the Scotch fashion, on behalf of the Crown; and in due time the *soi-disant* 'Mary Macdonald' was tried for murder and theft at the Glasgow Circuit Court, (September, 1862). The advocate-depute Gifford, afterwards a judge of the Court of Session, prosecuted; Mr. Clarke was retained for the defence; Lord Deas was on the bench. The conduct of the case for the prisoner will probably divide legal opinion till the end of time. Mr. Rutherford Clark took up two lines of defence—a general plea of 'Not guilty,' and a special plea, throwing the blame of the murder on Mr. Fleming. He cross-examined that unfortunate gentleman ably and severely, and urged upon the jury that his behaviour, before and after the murder, was incompatible with innocence. But, luckily for the prosecution, the law gave the last word to Lord Deas. Sir George Deas (1804-87) was one of the most remarkable men that ever sat on the Scottish bench. In bluntness of speech he was no unworthy descendant of Braxfield, and his bitter tongue spared neither the criminals he sentenced nor the counsel that defended them. 'Prisoner at the bar,' he once said to an unhappy house-breaker, on whose behalf a very young advocate had been feebly urging some 'extenuating circumstances,' 'everything that your counsel has said in mitigation I consider to be an aggravation of your offence.' But Lord Deas was much more than a rough, and occasionally coarse, judge.

He possessed those high legal characteristics and qualities which in our own time have been united in Lord Bramwell alone—a healthy settled conviction that all crime is not insanity, a faculty of grasping and explaining to others complicated details, a gift of telling yet homely speech, a wide knowledge of law, and a power of persuading the constitutional tribunal. In the Sandfyord murder case Lord Deas had evidently made up his mind which way the verdict ought to go, and he so charged the jury that the verdict went in accordance with his judgment. The prisoner was found "Guilty," and the almost formal question whether she had anything to say in arrest of the sentence of death, was duly put. An extraordinary scene followed. Mr. Rutherford Clark asked and obtained permission from the judge to read a written statement that the prisoner had prepared. The purport of this statement was that old Fleming had committed the murder, and that Mrs. Maclachlan had accepted the silver plate as a bribe to conceal her discovery of his crime. But Lord Deas was not convinced. He declared that he had in his day prosecuted, defended, and tried prisoners innumerable, and that he had never found their written statements to be anything but a tissue of lies; and he promptly sentenced Mrs. Maclachlan to be hanged. Mr. Clark could hardly have anticipated any other result, and the prisoner's statement was clearly intended as an appeal to the bar of public opinion. This clever stroke of legal diplomacy—if such it was—was crowned with success. It was alleged that Mrs. Maclachlan's story was too circumstantial to be false; and all the noisy people in Scotland clamoured for a reprieve. The Home Secretary, Sir George Grey, bent before the storm. In spite of the opinion of Lord Deas, of the Lord Justice Clerk—to whom he applied in the first instance for advice—and of fourteen out of the fifteen jurors who, after considering Mrs. Maclachlan's belated confession, unanimously resolved not to interfere in her behalf, he took the unprecedented—and, as we venture to think, the highly improper—course of constituting a new tribunal for the re-trial of the case. Mr., afterwards Lord, Young, then one of the most eminent advocates at

the Scotch Bar, was commissioned to go to Glasgow and, in Sir George Grey's own words, 'get at the bottom of the matter.' Mr. Young held his investigation with closed doors in the Sheriff Court of Lanarkshire (October 16-18, 1862), and in due time presented his report. Thereupon the Home Secretary commuted the death sentence to penal servitude—justifying his action on the grounds that there was some doubt as to whether Mrs. MacLachlan was not merely an accessory after the fact, and that capital punishment ought not to be inflicted in the face of the strong and clearly expressed opposition of the public. At this distance, in point of time, it is hardly worth while to subject Sir George Grey's 'reasons' or his 'fears' to a minute analysis; and the chief modern interest of the Sandford murder case lies in its curious resemblance to *Regina v. Maybrick*.

In 1865, Mr. Rutherford Clark defended Dr. Edward William Pritchard, who was tried and eventually executed in Edinburgh for the murder of his mother-in-law and his wife by antimonial poisoning. The case for the prisoner was hopelessly bad; but Mr. Clark did all that could be done to save his life. We shall now simply refer the reader to Mr. Clark's cross-examination and comments upon the evidence of Dr. James Paterson, who, having been called in by Dr. Pritchard to see his mother-in-law, Mrs. Taylor, came to the conclusion that Mrs. Pritchard was being poisoned, and yet never went back to see her because 'she was not his patient.'

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 25.

Judicial Abandonments.

Damase Bédard, trader, Lashute, Oct. 22.
Drolet & Co., boots and shoes, Quebec, Oct. 21.
Hubert Alfred Houde, grocer, Quebec, Oct. 20.
François Leblanc, Arthabaskaville, Oct. 8.

Curators Appointed.

Re A. Beauvais, Montreal, an absentee.—Kent & Turcotte, Montreal, joint curator, Oct. 22.
Re Stanislas Boucher, Marieville.—Kent & Turcotte, Montreal, joint curator, Oct. 15.
Re J. Landsberg, Sherbrooke.—Kent & Turcotte, Montreal, joint curator, Oct. 20.
Re François Leblanc.—A. Quesnel, Arthabaskaville, curator, Oct. 21.

Re Augustin Limoges.—J. M. Marcotte, Montreal, curator, Oct. 13.

Re Arohibald McCallum, jeweller, Quebec.—H. A. Bédard, Quebec, curator, Oct. 20.

Re O. Bégin & Co., shoe manufacturers, Quebec.—N. Matte, Quebec, curator, Oct. 18.

Dividends.

Re Wm. Gariépy, Montreal.—Dividend, payable Nov. 14, J. Frigon, Montreal, curator.

Re Emerie Lacasse.—First and final dividend, payable Nov. 1, Bilodeau & Renaud, Montreal, joint curator.

Re Jean Lemelin, grocer.—First and final dividend, payable Nov. 10, H. A. Bédard, Quebec, curator.

Separation as to property.

Emélie Obé, vs. Joseph Perrault, trader, Levaltrie, Oct. 18.

Separation from bed and board.

Emma Hallé vs. Louis George Bégin, trader and contractor, St. David de l'Aube Rivière, Oct. 16.

Thanksgiving Day.

Thursday, Nov. 6, proclaimed a day of public thanksgiving.

SURPRISES TO COUNSEL.—The following is said to have occurred in the Cass County (Mich.) Circuit Court during the incumbency of the late Judge Blackman. Lawyer T. had sued out a writ of *capias*. Lawyer L. moved to quash the writ for the reason that the affidavit upon the filing of which it issued did not sufficiently set forth the nature of the plaintiff's cause of action. At the hearing of the motion the discussion turned upon the interpretation of the word 'nature' as used in the statute which required the nature of the plaintiff's cause of action to be set forth in an affidavit before a writ of *capias* could issue. Lawyer L. was proceeding with his argument when the Court interrupted him with the following query: The Court—What are you reading from, sir? Lawyer L.—From a work on logic, your honor. The Court—Did you give Brother T. notice that you were going to read from a work on logic? Lawyer L.—Of course not, your honor. The Court—Are you aware, sir, of the rule of Court which requires notice to be given of matter which would be liable to surprise the attorney on the other side? Lawyer L.—Yes, your honor, but the rule has no application to a matter of this kind. The Court—I don't know, sir; I don't know. I know of nothing that would surprise Brother T. more than logic, and if you haven't given him notice that you are going to read from a work on logic, why I can't permit you to read it. Lawyer L. proceeded with his argument, and presently he was again interrupted by the Court. The Court—What are you reading from now, sir? Lawyer L.—'Green's Grammar,' your honor. The Court—Did you give brother T. notice that you were going to read from 'Green's Grammar'? Lawyer L., very testily—Of course not, your honor. The Court—Well, sir, I know of nothing in this world aside from logic that would surprise brother T. more than grammar, and if you haven't given him notice that you are going to read from 'Green's Grammar,' why I can't permit you to read it, and I shall have to deny your motion with costs.—*Albany Law Journal*.

The Legal News.

VOL XIII. NOVEMBER 8, 1890. No. 45.

A singular case of 'touting' for legal business has attracted some notice in Bombay. One Kanji Luhda approached Lord Colin Campbell, a barrister of the High Court of Bombay, and offered to procure business for him if Lord Colin would pay him a commission on the fees thereby gained. By way of overcoming any scruples which Lord Colin might entertain, the tout informed him that certain other barristers of the High Court, and among them the Advocate General of Bombay, were in the habit of allowing him part of their fees on the business procured by him. This statement reached the ears of the gentlemen named, who declared that it was wholly false, and they have laid an information against the tout for defamation. In some parts of India it is a criminal offence for a barrister to pay a commission on business obtained for him.

State of North Carolina v. Douell, 11 S. E. R. 525, appears to be an extraordinary case. It raised the question whether a husband can properly be convicted of assault on his wife with intent to commit rape. The facts were that the white husband of a white woman, by threat of death and holding a loaded gun over the parties, compelled a negro to undertake a sexual connection with his (the white husband's) wife. Before the act was consummated, the accidental discharge of the gun enabled the negro to make his escape. The crime of assault with intent to commit rape being a misdemeanor, in which no degrees are recognized, the husband was indicted as a principal, and convicted. Shepherd, J., delivering the majority opinion of the Supreme Court, sustaining the conviction, said: "The defendant strangely insists that he is not guilty because he is the husband of the prosecutrix; and he relies as a defence upon the marital relation, the duties and obligations of which he has, by all the laws of God and man, so brutally violated. In our opinion,

in respect to this offence, he stands upon the same footing as a stranger, and his guilt is to be determined in that light alone. The person of every one is, as a rule, jealously guarded by the law from any involuntary contact, however slight, on the part of another. The exceptions, as in the case of a parent, or one in *loco parentis*, moderately chastising a child, or a schoolmaster a pupil, are strict and rare. It was at one time held in our state that the relation of husband and wife gave the former immunity to the extent that the courts would not go behind the domestic curtain, and scrutinize too nicely every family disturbance, even though amounting to an assault. But since *State v. Oliver*, 70 N. C. 60, and subsequent cases, we have refused the 'blanket of the dark' to these outrages on female weakness and defencelessness. So it is now settled that, technically, a husband cannot commit even a slight assault upon his wife, and that her person is as sacred from his violence as from that of any other person. It is true that he may enforce sexual connection; and, in the exercise of this marital right, it is held that he cannot be guilty of the offence of rape. But this privilege is a personal one only. Hence if, as in *Lord Audley's case*, 3 How. St. Tr. 401, the husband aids and abets another to ravish his wife, he may be convicted as if he were a stranger. The principle is thus tersely expressed by Sir Matthew Hale: 'For though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another.' (Hale P. C. 629.)"

A wife went to a camp meeting lately, and while there submitted to sundry familiarities on the part of persons present, which displeased her husband, and an action for a divorce was the result. Proof being made of gross improprieties, her counsel had the hardihood to urge in her behalf that such things were so customary at camp meetings that nothing wrong could be presumed from them. The Court (Bird, V. C., in *Patterson v. Patterson*, New Jersey) was evidently somewhat shocked by this plea, and said:—"Counsel insists that many of the acts complained of—such as kissing, and the taking of likenesses together, and the resting of the head of a mar-

ried man in the lap of a married woman not his wife—are simple acts of indiscretion, and very frequently indulged in in social intercourse in these modern times. I do not believe that society has become so degenerate. It is incredible to suppose that such acts are regarded as common events, or of constant occurrence, and considered of slight or no importance with respect to character or consequent influence upon the individual indulging therein. Nor do I believe that they have become so open or notorious at Asbury Park where these parties lived, as to be the subject of constant observation by every visitor or beholder. I speak of this not to defend the people of Asbury Park, but for the purpose of showing that if social intercourse in Asbury Park has become so cyprian in its character as to regard the acts referred to as of slight consequence, counsel for defendant would have had no difficulty in proving to the court the multitudinous cases which he declared were daily taking place. The fact that there is an utter failure in this behalf shows beyond disputation that Asbury Park is not in any sense subject to the unworthy charge."

COURT OF QUEEN'S BENCH— MONTREAL.*

Composition agreement—Not signed by all the creditors—Novation—Option—Tender.

Held:—That where an agreement of composition is prepared, by which the creditors agree to accept a composition on the amount of their respective claims, and the agreement is not signed by all the creditors as was contemplated, and it does not appear that those who signed, individually intended to compound for the amount of their respective claims independently of the other creditors, novation is not effected of the claim of a creditor who signed the agreement, but who subsequently refused to accept the composition, and did not in fact receive the same.

2. That even supposing the composition agreement to be binding, the curator to the judicial abandonment subsequently made by the debtor was bound, in his tender, to give

the creditor the benefit of the option contained in the agreement, viz., satisfactory endorsed notes for 40 cents on the dollar, or 35 cents in cash, and in contesting the creditor's claim for the amount of the original debt, was bound to repeat the tender with option as above stated.—*McDonald & Seath*, Dorion, Ch. J., Cross, Baby, Church and Bossé, JJ., Nov. 20, 1889.

Suretyship—Bond—Donation by surety.

Held:—That where a bond has been given to the Crown for the fidelity of a public officer, no claim exists against the surety so long as the person whose fidelity is assured has not made default. Therefore a sale or donation made by the surety of all his property and effects, after the date of the contract of suretyship, but before any default has occurred, will not be revoked at the instance of the Crown, in the absence of proof that any claim against the surety resulting from the bond existed at the date of the donation.—*Marion & Postmaster-General*, Dorion, Ch. J., Tessier, Baby, Church, Bossé, JJ., Jan. 22, 1890.

Receipt—Valuable security—R. S. Canada, ch. 173, s. 5.

Held:—(Cross, J., diss.). That a receipt or discharge of a debt is not a valuable security under chapter 173 of the Revised Statutes of Canada, and that the obtaining of such a receipt or discharge by means of violence or threats of violence, is not a felony coming within the 5th section of the Act.—*Reg. v. Doonan*, Dorion, Ch. J., Tessier, Cross, Baby Doherty, JJ., March 26, 1890.

Banking Act, 34 Vict. (D), Ch. 5, secs. 26, 58—

Double liability—Responsibility of pledgees of stock—Savings Bank—34 Vict. (D), ch. 7, secs. 17, 18, 19.

Held:—(Affirming the judgment of *Johnson, J.*, M. L. R. 2 S. C. 51), 1. That a Savings Bank, holding bank shares as pledgee, and appearing as owner on the books of the bank, is not the owner of such shares within the meaning of sect. 58 of the Banking Act, 34 Vict. (D), ch. 5, and therefore is not subject to the double liability.

*To appear in Montreal Law Reports, 6 Q. B.

2. A bank, shares of which are transferred to a savings bank, is presumed to know that the shares are held by the latter as collateral security, inasmuch as under sect. 18 of 34 Vict. (D), ch. 7, a savings bank cannot acquire bank shares or hold them except as pledgee.—*Exchange Bank of Canada & City and District Savings Bank*, Dorion, Ch. J., Tessier, Cross, Baby, Church, J.J., Sept. 27, 1887.

Privilege—Attorney—Costs—Arts. 1994, 2009 C.C.—*Saisie conservatoire.*

Held :—(Reversing the judgment of WURTELE, J., M. L. R., 5 S. C. 374, DORION, Ch. J., and CHURCH, J. *dis.*). 1. In law costs (*frais de justice*) are included all costs incurred for the common interest of the creditors, whether it be in recovering property for the debtor, or in preventing his property from being carried away, diminished or lost.

2. Under Art. 2009, C.C., costs incurred for the common interest of the creditors, and declared privileged by the article, are not necessarily costs incurred in a suit; it is sufficient if they are expenses incurred for the common interest.

3. Counsel fees and disbursements incurred in saving for the *grevé* a sum of money of a substitution may constitute a privileged claim upon such money under Art. 2009, C.C., and a *saisie-conservatoire* may be made of such money.—*Barnard & Molson*, Dorion, Ch. J., Tessier, Baby, Church, Bossé, J.J., May 23, 1890.

SUPERIOR COURT—MONTREAL.*

Voiturier—Responsabilité—Valise—Preuve du contenu.

Jugé :—1o. Qu'une compagnie voiturière est responsable de la perte de la valise de l'un de ses passagers, laissée sous sa garde, dans un de ses hangars à bagage, pour être examinée par les officiers de la douane;

2o. Que, dans ce cas, la valeur du contenu de la valise peut être établie par le serment du demandeur, qui peut y inclure les effets appartenant à sa femme.—*Davidson v. Canada Shipping Co.*, Pagnuelo, J., 30 mai 1890.

Presse—Libelle—Responsabilité—Justification.

Jugé :—Qu'il n'y a pas lieu à une action en dommage contre le propriétaire d'un journal, lorsque ce journal a publié des nouvelles de nature à nuire à la réputation de quelqu'un, si ces nouvelles sont publiques de leur nature, substantiellement vraies, et publiées dans l'intérêt public.—*Turgeon v. Wurtele*, de Lorimier, J., 16 mai 1890.

Destination d'une rue publique—Acceptation tacite—Rue ouverte à la circulation générale par le propriétaire du terrain—Prescription.

En 1846, B. propose à la cité de Montréal d'ouvrir une rue sur sa propriété. Sa requête fut référé au comité des chemins qui déclara accepter l'offre en y apposant certaines conditions, mais le projet ne fut jamais sanctionné par le conseil de ville. Cependant, B. fit préparer un plan de ses terrains en y indiquant comme rue projetée, la nouvelle rue, et vendit même certains lots décrits comme étant bornés par la dite rue. Les acquéreurs de ces lots bâtirent sur la ligne de cette rue qui ne fut jamais définitivement ouverte, et dont une extrémité fut fermée par une clôture avec ouverture pour piétons. Depuis plus de trente ans, cependant, la rue a servi au public comme voie de communication, mais sans que la ville de Montréal l'ait jamais reconnue formellement comme rue publique.

Jugé :—1o. Que dans ces circonstances, il y avait suffisamment destination de cette rue de la part de B. pour empêcher les représentants de ce dernier de prétendre que les terrains ainsi ouverts à la circulation générale, sont propriété privée.

2o. Que l'usage général par le public comme rue, d'un terrain destiné par le propriétaire à faire une rue, comporte acceptation du terrain pour les fins d'une rue publique.

3o. Qu'aucune acceptation formelle par la ville de Montréal, n'était pas nécessaire dans ces circonstances, l'acceptation de la dite rue par le public, de la manière indiquée, étant suffisant pour faire du terrain une rue publique.

4o. Qu'un propriétaire ne peut, après avoir ouvert une rue à la circulation publique revenir sur cette destination, et fermer la dite rue après qu'elle a été ainsi acceptée par le public.—*Childs v. Cité de Montréal*, Pagnuelo, J., 28 juin 1890.

*To appear in Montreal Law Reports, 6 S. C.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

(Continued from p. 350.)

This learned judge insists that any agreement on the part of the insured, in regard to the future, must, in order to bind him, be expressed in the policy, and that unless it is so expressed, any allegation and proof of it as a defence, on the part of the insurer, will be a direct violation of the rule, that extrinsic evidence is inadmissible to vary or control a written contract, and consequently should not be permitted. Though he admits that the case is different with a representation of an existing fact, his argument necessarily bases the effect of such a representation in invalidating the policy, simply upon its untruth at the time it is made, and therefore holds that it is of no force, so far as regards any implied stipulation, that the fact represented shall continue to exist during the whole period of the risk. Thus where one represents his building as occupied for a certain specified purpose, the result of the Chancellor's argument is, that if these facts are not true at the time the representation is made, then the policy is void, but if, on the next day or week after the policy is issued, the house is permanently put to a more hazardous use, it will constitute no defence for the insurer to an action on the policy. But this conclusion is opposed to the invariable tenor of the decisions both in England and this country, such representations having been always construed to be representations, not only that the fact exists, but also that it will continue throughout the duration of the risk, so far as this depends upon the insured. But the opinion of the Chancellor, even in regard to representations, purely and solely promissory, is not supported by the decisions. See *Edwards v. Footner*.¹

¹ 1 Camp. 530. This was a case of a man insuring a ship to sail with two others, and to carry 10 guns and 25 men. She sailed alone, and did not carry so many guns or men. She was captured; the insurer was freed. In *Dennistown v. Lillie*, 3 Bligh, the insured, by letter, instructed correspondents to effect insurance.

Mr. Duer has ably reviewed the position taken in *Alston v. Mechanics' Mut. Ins. Co.*, and has showed its error, as well as that of *Bryant v. Ocean Ins. Co.*, 22 Pick. 200, which supports the opinion of Chancellor Walworth, and he has plainly demonstrated by an analysis of the various decisions on the subject, that promissory representations have been from the first recognized by the courts, and that a substantial compliance with them is necessary to the validity of the policy. See *Duer on Ins.*, Lect. 14, note 6.

It must, however, be admitted that the settled law, in regard to the effect of misrepresentations without fraud upon the policy, as laid down in the cases above cited, and denied in *Alston v. Mechanics' Mut. Ins. Co.* is a departure from the rule in reference to the admissibility of parol, or extrinsic evidence, to vary or control written contracts. If the representation is admitted in evidence, it is plain that the insurer is permitted to show by proof of an agreement extrinsic to and independent of the policy, that the contract is not such as the terms of the policy taken by itself, would imply. Mr. Duer and Mr. Arnould agree that this salutary rule of evidence has been, in a measure, violated; and while they consider the law as too well settled, both in the U.S. and in England, to be shaken,¹ they still express a decided preference for the doctrine prevalent on the continent of Europe, which requires the insertion in the policy of all material facts, which, however, are not to be construed as warranties, unless an intention to that effect is expressly and unequivocally declared.

Representations promissory impose as a duty the performance of future acts, says Mr. Park. What is such a thing, I say, but a warranty; and is it to be tolerated that a warranty shall be fixed as addition to a written agreement and established by parol?

A letter from the insured was shown to the insurers, stating that the ship "will sail on 1st May." The ship sailed 23rd April and was captured on the 11th May coming from Nassau to the Clyde. The expression in the letter was held to be positive, and not a mere statement of expectation; and being a material representation and untrue, the insurer was freed.

¹ When some strong judge comes along it will be shaken.

§ 201. *Misdescription and Misrepresentation.*

Even in the absence of special condition, a written misrepresentation whereby a risk is taken which might not have been taken on a true representation, or whereby less premium is paid than would otherwise be, is sufficient to render void the policy. All peculiar circumstances of risk arising from the situation of the subject insured, the construction of buildings, the nature of the trade carried on in them, or of the goods therein, should be mentioned so that the risk may be understood. If not mentioned, or if buildings or goods be described otherwise than they really are, or if after an insurance the risk be increased by changes in the property insured or by the erection of new ones, or by the putting up or alteration of any stove, the carrying on of any hazardous trade or process, the storing of any hazardous goods, or in consequence of the formation of any hazardous communication, or by any means whatsoever, the insured will by the conditions of most offices' policies lose the benefit of his insurance.

Where mere movables or goods are insured, the insured ought to give a true description of the building containing them, and to disclose all material facts known to him and of which the insurers may be presumed to be ignorant. By material facts here are meant all those which if communicated to the insurer might induce him to refuse the insurance, or not to take it unless at a higher premium.

If a false representation be made of the cost of, or outlay upon, buildings, and thereupon a policy be granted, it may be held material misrepresentation, and, whether made by design or mistake, the policy will be avoided.¹

The offices generally mention, upon or in their policies, the various classes of risks and rates of premiums. The lowest rate is for "common insurances," as upon buildings exposed to the least degree of hazard. The premium is

higher for "hazardous insurances," as upon buildings which from their situation or construction are more susceptible of ignition, or buildings not of themselves hazardous, but in which hazardous trades are carried on, or in which there are perils, as from hazardous goods or from stoves. The premium is higher still for "doubly hazardous insurances," as buildings which from their construction or materials are of a hazardous nature, and in which hazardous goods are deposited or hazardous trades carried on.

There are also cases of extraordinary risk, as those upon sugar refineries, not included in the usual tables of premium. These are usually made the subjects of special agreements, all the circumstances being taken into consideration.

Goods also are classed into not hazardous, hazardous, and extra hazardous.

The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.¹

Art. 2572 C. C. L. C. says it is implied warranty that the description by the insured shall be such as to show truly under what class of risks it falls, according to the proposals and conditions of the policy.

A mere nominal misdescription of a building, if the building be known and the description be in the main correct, will not vitiate the policy.

But if a building be described as first class instead of second, where the premium for the second is higher than for the first class, the insurance of such building will be null if the building, at date of insurance, was only of second class.²

The conduct of the assured after an insurance cannot retroact, but if a building was insured as in one class, or as one thing, (under which case, had it been burned, the assured could not have recovered), he shall not recover by afterwards making the thing insured all right, to come into the class in which it was insured. He cannot even compel the company to keep the risk by extra payment.

¹ *Carpenter v. The A. Ins. Co.*, 1 Story, 67. Where there is over-valuation grossly out of proportion to actual value, the plaintiff is not free from charge of fraud; *Wall v. Howard Ins. Co.*, 51 Maine.

¹ Civil Code of Lower Canada, Art. 2485.

² *McMorran case*, post.

As a false description in a sale will often entitle the purchaser to have a rescission of the sale, so in insurance a false description may nullify an insurance contract. Suppose a house at a distance be insured, and it be stated to be only a mile from the cathedral church of S., whereas it was three miles distant, this might be material. Distance is often of importance. Aid cannot be obtained as well at a distance of three miles from a town as in the town. Water-plugs may be within one mile, but not at a distance of three miles from the cathedral of S.

Again, if a man insuring say that a house is in thorough repair, and worth £500; though it be worth only £300 he might recover if the house is in thorough repair. The insurer may be treated on the mere value point, as a purchaser is in a case of sale.¹ But if the house is not in thorough repair, but badly in want of repair, *semble* the insurance is null.

In a case before the Cour d'Appel de Paris (Augnat, 1873) roofs were declared to be covered *en dur*, but part of one was in *carton bitumé*. A false declaration was charged against the insured after the fire; but, owing to the small portion of the roof covered with *carton*, the assured recovered, the Court remarking that no augmentation of risk appeared, and, moreover, the description in the policy had been in the company's office after the visit of an inspector to the building.

Four houses were insured as brick, but separated from one another in part by wooden framings filled with brick. Held no misdescription.

Suppose houses are insured as brick, but have all openings, doors and windows, and cornices and porches of wood; certainly this is not misdescription.

A insures "his house in St. James street, No. 30." His house is No. 31; he has none other in that street. This is not fatal. *Roland's* case (*post*) is very different.

Insurance was effected by A on his books in the bindery of B, "in the third and fourth

stories" of a certain building. The bindery was really in the fourth and fifth stories. The amount of premium would have been no higher had the description mentioned the fourth and fifth stories; the risk was not increased. The insured recovered.¹

[To be continued.]

SOME SCOTTISH JUDGES.

The Right Honourable John Inglis, Lord President of the Court of Session, and Lord Justice General of Scotland, is the eldest son of the Rev. John Inglis, D.D., (1763-1834), who was in his day the foremost ecclesiastic in the General Assembly of the Church of Scotland. He was born in Edinburgh in 1810, and was educated at the famous High School, and afterwards at the University of Glasgow, and at Balliol College, Oxford, whence he carried away a B.A., (1834) and an M.A. (1836) degree. In 1835 he was admitted to the Faculty of Advocates. The subsequent facts in the Lord President's career may be ranged conveniently around a few leading dates. From February till May, 1852, he was Solicitor-General. From May to December, 1852, and again from February till June, 1858, he held the office of Lord Advocate. For six years (1852-58) he was Dean of the Faculty of Advocates. In 1858 he succeeded John Hope as Lord Justice Clerk, with the title of Lord Glencorse; and in February, 1867, he became President of the First Division and Lord Justice General of Scotland. Inglis's Parliamentary experience was somewhat narrow; he sat in the House of Commons as M.P. for Stamford from Febru-

¹ *Baird v. Philadelphia Ins. Co.*, Hunt's Merchant's Mag., vol. 28 p. 336. But is it the thing insured where the second and third stories were insured, and the third and fourth are burned? Suppose a house consisting of a centre and two wings, east and west, and all in the centre and east wing be insured: can the centre and west wing be held insured? The answer may depend on the particular circumstances. For example, if the insurers visit the place, and incur say, a library *in situ*, but make a false description according to the points of the compass.

¹ Burge, *Suretyship*, p. 223.

ary till July, 1858. His university honours have been numerous—Edinburgh, Glasgow, Aberdeen, and Oxford giving him of their best without stint or measure.

Such, in brief outline, has been the public career of the Lord President. But this dry *résumé* of facts conveys to the reader a most imperfect idea of his intellectual quality and of the estimation in which he is held by the people of whose judicial system he is the head.

Lord President Inglis is permanently associated in the mind of every educated lay Scotchman with the trial of Madeline Smith in 1857. He was then Dean of Faculty. He had the reputation, within the walls of the Parliament House, of being the first advocate of the day, and he had already—though only for a short period—been the chief law officer of the Crown. His practice was at once large and select. But such facts as these prove impressive only to the initiated or the interested; and if Inglis had died, or retired from public life, in the beginning of the year 1857, his forensic memory would not have been cherished, as it now is, by the laity of Scotland.

On June 30, 1857, Miss Madeline Hamilton Smith, the daughter of an architect of good position in Glasgow, was brought to trial before three judges of the Edinburgh Court of Justiciary—Lord Justice Clerk Hope, Lord Ivory, and Lord Handyside—on a charge of having poisoned her lover and seducer, Emile l'Angelier, with arsenic. The youth of the prisoner—she was but twenty-one years—her social status, her appearance, the mystery of the case, and the cruelty of the murder, if murder were committed, aroused and stimulated public interest to the highest degree. Miss Smith's defence was entrusted to Mr. Inglis, who forth with became a cynosure for every eye. The wildest rumours circulated—and, if we may anticipate a little, are in circulation still—as to the great advocate's behaviour during the critical interval between the indictment and the trial of the prisoner. 'He was living in the deepest seclusion;' 'none of his relatives dared to address him;' 'he believed Miss Smith to be innocent;' 'he

knew her to be guilty;' such and a hundred other reports were in vogue. One of these tales has displayed a vitality so persistent that it deserves to be recorded. L'Angelier died from arsenical poisoning, and traces of a large dose were found in his stomach and intestines. The line of defence—so the story goes—which Mr. Inglis had at first determined to assume was that arsenic, being a mineral poison, would necessarily have sunk to the bottom of the cup of coffee or cocoa in which it was alleged to have been administered, and could not therefore have been taken in any quantity by the deceased, at least through the medium on which the Crown relied. It is obvious that this contention, if well founded, weakened the case for the prosecution and lent colour to the hypothesis of suicide, suggested by the defence. Mr. Inglis sent for an eminent Edinburgh chemist, and propounded to him the theory which he thought of trying to establish. This gentleman subjected it to a single and a fatal experiment. He took a cup of coffee and poured into it a quantity of arsenic; sure enough the deadly mineral sank to the bottom of the cup. The cloud rose for a moment from the advocate's face. 'But suppose,' said the chemist, 'that we do what is usually done by a young lady who hands to a friend a cup of coffee which she has prepared; suppose that we stir the contents with the spoon.' In an instant the arsenic was temporarily suspended in the coffee; and it was clear that the whole might have been swallowed without a suspicion of anything except grounds! 'Good night,' said Mr. Inglis, quietly closing the conference and returning to his papers, 'we shall not need your evidence at the trial.' The prosecution of Madeline Smith was conducted by the Lord Advocate, the Hon. James Moncrief (who afterwards became the Lord Justice Clerk of Scotland), with remarkable ability and moderation. The Dean of Faculty followed with a speech which was at once declared by the press and by the public to be the forensic masterpiece of the century. Delivered under great mental excitement, emphasizing and ennobling the arts of the accomplished advocate, it told upon the jury, and even upon the bench, like an electric

shock, and the paralysed arm of Justice released its prey. Miss Smith escaped with the dubious Scotch verdict of 'Not proven,' and her name is never mentioned without a complimentary reference to 'the old man eloquent' who defended her. The mellowing influence of time has not greatly dimmed the lustre of Mr. Inglis's wonderful speech. It is by far the most brilliant forensic effort that has ever been made in the Parliament House, and will bear a not unfavourable comparison with Sergeant Shee's defence of Macnaghten and Cockburn's defence of Palmer. The peroration is good; but the exordium, beginning with 'The charge against the prisoner is murder and the punishment of murder is death,' is, in our opinion, better still, and could hardly be surpassed.

During his tenure of the office of Lord Justice Clerk, Inglis was called upon to preside at the trial of Dr. Pritchard, who was eventually condemned and executed for the murder of his mother-in-law and his wife by antimonial poisoning. His lordship's charge to the jury was a model of elegance and clearness. He disposed very neatly of two ingenious points which had been raised for the defence. The Solicitor-General had dwelt upon 'the opportunities' for committing the alleged crimes which Pritchard had enjoyed. The prisoner's counsel (Mr. Rutherford Clark) pointed out that the so-called opportunities arose from the prisoner's position as son-in-law and husband, and were not in any sense of the term his fault. 'A very proper observation,' said the Lord Justice Clerk; 'but then, gentlemen, you must remember that the learned counsel is not entitled to argue the case as if these opportunities did not exist.' Mr. Clark's next contention was that the Crown had merely traced the alleged murders to the door either of the prisoner or of a young servant-girl whom he had seduced under promise of marriage, and had called upon the jury to decide between the two upon a balance of probabilities. The Lord Justice Clerk observed that the learned counsel did not seem to have sufficiently adverted to the fact that both parties might, perhaps, have been implicated in the crimes, and that in such a case a jury would have

little difficulty in deciding as to which was principal and which agent.

The Lord President is reputed to be, and is, the greatest lawyer and the ablest judge on the Scottish bench. His mind is pre-eminently judicial. He possesses, besides a profound knowledge of Scots law, educated common sense, and the capacity of listening to an argument without interrupting it. A debate in the First Division never descends to the level of a wordy wrangle between the bench and the bar. The Lord President is also the most cultured of his countrymen. His knowledge of ancient and modern classics is both wide and exact. He has sensitive literary perception and writes a charming style.—*Law Journal (London).*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Oct. 31.
Judicial Abandonments.

Eug. Arcand, trader, St. Césaire, Oct. 23.
James Dawson & Co., dry goods, Montreal, Oct. 22.
Médéric Barbeau, trader and farmer, parish of St. Constant, Oct. 20.
Bruno Duperré, saddler, Quebec, Oct. 27.
F. X. Gagnon, grocer, Quebec, Oct. 24.
Landry & Frères, butchers, Ste. Scholastique, Oct. 22.
Placide Laroche, trader, St. Cajetan d'Armagh, Oct. 25.
Alexandre Millette, grocer, Longueuil, Oct. 22.
Adjutor Morissette, grocer, Quebec, Oct. 25.
Damase Pageot, trader, St. Sylvester, Oct. 30.

Curators appointed.

Re Médéric Barbeau, trader and farmer, parish of St. Constant.—C. Desmarteau, Montreal, curator, Oct. 23.
Re Bénéni Beaudin.—C. Desmarteau, Montreal, curator, Oct. 18.
Re Adjutor Bernier, stationer, Lévis.—Arvin Beaupré, Quebec, curator, Oct. 23.
Re James Dawson, et al., dry goods, Montreal.—A. F. Riddell, Montreal, curator, Oct. 29.
Re Dme. Vve. Jos. Côté, shoemaker.—H. A. Bedard, Quebec, curator, Oct. 23.
Re E. Donahue & Co., Farnham.—A. W. Stevenson, Montreal, curator, Oct. 30.
Re E. T. Favreau.—Bilodeau & Renaud, Montreal, joint curator, Oct. 29.
Re Albert Marquette.—N. Matte, Quebec, curator, Oct. 27.
Re Alex. Millette.—C. Desmarteau, Montreal, curator, Oct. 23.
Re Frank Ouellette.—C. Desmarteau, Montreal, curator, Oct. 7.
Re Alfred Tetrault.—Millier & Griffith, Sherbrooke, joint curator, Oct. 24.
Re Alexis Terrault, trader, Fraserville.—N. Matte, Quebec, curator, Oct. 27.

Dividends.

Re Magloire Bonhomme, St. Etienne.—First and final dividend, payable Nov. 19, Kent & Turcotte, Montreal, joint curator.
Re James Roberts.—First and final dividend, payable Nov. 18, C. Desmarteau, Montreal, curator.

Separation as to Property.

Elmire Lacouture vs. Jean Baptiste Ulrie alias Rodrigue Chapdelaine, trader, St. Ours, Oct. 27.
Adeline Paré vs. Augustin Perron, contractor and mason, Quebec, Oct. 27.

The Legal News.

VOL. XIII. NOVEMBER 15, 1890. No. 46.

The tendency of the time, to convert a private business into a joint stock company, is illustrated by the enormous increase in the number of these companies in England. Last year there were no fewer than 2,788 companies registered. The nominal capital exceeded 241 millions sterling, over fifty-two millions of which were paid up. The total number of registered companies, in April of this year, was 13,323, having a paid-up capital of upwards of 800 millions sterling; and this remarkable total is increasing at the rate of about a thousand companies every year. A large number of these companies are annually wound up, but capital continues to overflow from full pockets into new concerns. It appears, however, from the report of the Inspector-General in Bankruptcy, that the total losses arising from insolvency of all kinds throughout the country are diminishing.

The English County Courts are now going to insist upon their dignity being respected. At the Southampton County Court recently, Judge Leonard protested strongly against the practice of solicitors appearing before him unrobed. The judge said he noticed that there were several solicitors at the table, but not one of them had his gown on. He always directed that the table should be kept clear and everything done for their convenience, and unless they showed some respect to the Court in return he should refuse to hear their cases. He did not think it right for advocates to appear in short jackets and top-coats. The solicitors excused themselves on the ground that no place had been provided for the purposes of a robing-room.

Of Lord Young, of the Second Division of the Court of Session (Scotland), the *Law Journal* tells the following anecdote illustrating his impatience, which constantly prompts to interlocutory remarks:—"A

civil case was being tried in the Court of Session. Lord Young was on the bench. Mr. Gloag, now a senator of the College of Justice, appeared for the pursuer, and proceeded to lay the evidence before the Court. The first witness was called, and a few preliminary questions were put and answered without interruption. Suddenly the judge roused himself and took the examination-in-chief into his own hands. Mr. Gloag, who had a lively and proper sense of his own importance, courteously endeavored to assert his rights, but the judicial catechist remained master of the field. When he had extracted by a number of skilful questions everything that the witness had to say, Lord Young looked down to the advocate with a complacent smile. Mr. Gloag had resumed his seat and made no motion to rise. 'Now then, Mr. Gloag,' interjected the judge, sharply, 'let us get on.' 'I am waiting,' was the answer, 'for your lordship to call the next witness.'

COUR DE MAGISTRAT.

MONTREAL, 23 octobre 1889.

Coram CHAMPAGNE, J. C. M.

MALO V. BRIEN dit DESROCHERS.

Plaidoirie—Admission—Preuve.

JUGÉ:—*Qu'un plaidoyer de paiement, précédé d'une défense au fond en fait, n'est pas une admission de la dette, et ne permet pas au demandeur de prendre jugement sans prouver sa demande.*

PER CURIAM:—L'action est sur compte.

Le défendeur par un premier plaidoyer nie les allégations de la demande, et par un second plaidoyer, il dit qu'il a payé au demandeur tout ce qu'il pouvait établir lui être dû. Le demandeur prenant le second plaidoyer comme une admission de son compte, déclara qu'il n'avait pas de preuve à faire. Le défendeur, de son côté, fit la même déclaration. Le compte est-il établi par admission de la part du défendeur? Le second plaidoyer ayant été fait sous le bénéfice du premier, le demandeur ne se trouve pas par là dispensé d'établir sa créance; et en l'absence de preuve, l'action doit être renvoyée sauf recours.

Action renvoyée sauf recours.

Autorités :—Lederc v. Girard, 1 Q. L. R. 382 ;
Sarault v. Ellice, 3 L. C. J. 137.

E. Desrosiers, avocat du demandeur.

Girouard & de Lorimier, avocats du défendeur.

(J. J. B.)

COUR DE MAGISTRAT.

MONTRÉAL, 12 décembre 1889.

Coram CHAMPAGNE, J. C. M.

LACASSE V. PAGÉ.

Injures—Lettre privée—Publication.

JUGÉ :—*Qu'une lettre injurieuse adressée à une personne peut donner lieu à une action en dommages en réparation d'injures, quoiqu'elle ne soit pas publiée, le défaut de publication n'étant qu'une raison pour diminuer les dommages.*

Le défendeur Charles Pagé écrivait à la demanderesse le 16 octobre 1889, la lettre suivante : "Vous êtes venu la semaine dernière chez moi pour vendre des morceaux de machine à coudre, je les ai achetés, il est vrai, et il me semble que la somme de \$3 que je vous ai donnée payait grandement votre lot de bricoles, alors je ne vois pas pourquoi vous voulez vous faire payer deux fois. En les prenant d'abord je vous ai donné qu'une piastre, n'ayant que cela sur moi, vous êtes venu le 14 courant pour avoir la balance, et je n'y étais pas moi-même, alors mon frère vous a donné deux bills de \$1, il me semble que cela doit faire \$3 comme il était convenu. Si vous voulez faire comme votre défunt mari a toujours fait dans son commerce de machine à coudre, alors rien ne m'étonne que vous agissiez de la sorte. Si vous tenez à votre honneur j'espère que vous serez assez dame de rapporter cette piastre."

La demanderesse prit une action contre le défendeur, signataire de cette lettre, pour \$50 de dommages comme réparation pour les injures contenues dans la lettre.

Le défendeur plaida que cette lettre n'avait fait aucun tort à la demanderesse, qu'elle n'avait aucunement été publiée, qu'elle était restée privée entre eux et était ainsi privilégiée; que son intention n'avait jamais été

d'injurier la demanderesse, mais seulement de réclamer ce qui lui était dû.

Le défendeur a été condamné par le jugement suivant :

PER CURIAM :—Une lettre injurieuse adressée à une personne peut donner lieu à l'action pour injure, bien qu'elle n'ait pas été publiée; il appartient au tribunal de voir si le défendeur a agi par malice, et dans ce cas le défendeur doit être condamné. Le défaut de publication de la lettre est une raison suffisante pour que les dommages accordés soient moins élevés.

Autorités :—Dareau, Traité des injures, p. 54, No. 8; *Sirey, Recueil général des lois*, 1851 à 1860, vo. *Injures*; du do 1791 à 1850, vol. 3; vo. *Injures*; *Roy v. Turgeon*, 12 Q. L. R. 186; *Larombière*, vol. 5, art. 1382.

Jugement pour \$6 de dommages et \$6 de frais.

Augé & Lafortune, avocats de la demanderesse.

Sicotte & Murphy, avocats du défendeur.

(J. J. B.)

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

[Continued from p. 356.]

In the *Bay State Glass Co. v. People's F. I. Co.* one question was : "State distance and materials of other buildings within 100 feet of building to be insured." Insured answered : "See plan." The application provided that if any statement is omitted where it is required, all facts will be assumed against insured and most favorably to the risk. The applicant also covenanted that he had "made a full and true exposition of all the facts in regard to 'situation, etc., and risk of the property to be insured, so far as known to him.'" The plan stated some, but omitted to state others of the buildings within 100 feet of the one insured. The verdict was given for plaintiff, contrary to the charge of the Judge.

A restaurant has been held in New York not to be an inn, and a restaurant-keeper is

¹ Monthly Law Reporter of 1857.

not liable as an inn-keeper, for things lost in his rooms by a person eating a meal.¹

Where there has been an omission in the description of the buildings insured, whereby the risk is not exhibited properly, the insured may prove that the inexactitude of the description resulted from the act of the agent of the company-insurer in writing the policy, provided all be shown to be unaltered and just as the agent saw them.²

Where a house insured is described as within three miles from Montreal, the distance must be measured in a straight line on the horizontal plane from point to point, and not by the roads in existence when the insurance was effected. So, if toll were prohibited within three miles from Montreal, the distance would have to be calculated in the same manner.³

A building fifty feet off was held not "contiguous" in *Arkell v. Comm. Ins. Co.*—89 N.Y. (Gas was prohibited to be in the insured building or contiguous thereto)

The condition of a policy was as follows:—"The application shall contain the place where the property is situated; of what materials it is composed; its dimensions; how constructed and for what occupied; its relative situation as to other buildings; distance from each if less than ten rods." The conditions were part of the policy; the application was not. The policy covered \$750 on a paper mill, and an equal amount on personal property therein. The defence was that the application did not mention all the buildings within ten rods of the mill. Held, that the condition related exclusively to applications upon buildings, and therefore furnished no ground of defence to the plaintiffs' claim respecting the personal property covered by the policy. *Trench v. Chenango Co. Mut. Ins. Co.*⁴ This case was overruled, however, in the case of *Smith v. Empire Ins. Co.*⁵ Here B, the insured, signed the application, and gave it to the company's sub-agent C, telling him to fill it up. He did so, and stated only one mortgage, whereas there were more. It was

held that B was responsible, as C was his agent, and the insured could recover nothing. A later case, *Rouley v. Empire Ins. Co.*,¹ is opposed to the above. In this case the defendant's agent filled up the application. The agent was told everything, but made a mistake. He was held to be the company's agent, and the company was estopped from saying that the application was not according to the conditions.

§ 202. Effect, where the insurance is divisible.

Sometimes insurance is divisible, sometimes indivisible. The objects insured, being distinct and in different situations, make as many insurances as subjects. *Journal du Palais*, A. D. 1877, p. 1835. Retention as to one by the assured may not be fatal to the whole policy. *Id.*²

The sum of \$1,150 was insured, the insurance being distributed over several items. There was a condition that in case the insured shall mortgage the property without notifying the secretary, then the insured shall not recover any loss or damage which may occur in or to the property insured, or any part or portion thereof. The insured mortgaged one of the subjects. Held, that the contract was one and indivisible, and the entire policy was avoided.³

¹ 36 N. Y. Rep. (March, 1867).

² See strong argument for indivisibility by Avocat Général Reverchon (*Journal du Palais*, A. D. 1873, p. 147), where a policy is issued covering different subjects for different sums, and the insured has been guilty of fraud, leading to insurance, as to one subject. Yet the original Court held the policy in this case to involve two contracts, and the *Cour de Cassation* said it could not interfere in such case, which the editors seem to question. See also *Gore Dist. Mut. F. Ins. Co.*, appellants, & *Samo et al.*, respondents. A building was insured for \$1,000; stock, \$2,000. The policy was subject to 36 Vict., c. 44 (Ont.). Its sect. 36 has been repealed by 39 Vict., c. 7. The insured made further incumbrances after the policy, and did not notify. The policy was held by the Court of Error of Ontario to be divisible. But the Supreme Court in 1879 held it indivisible and the policy wholly void. *Bramwell, B.*, in *Haine v. Venables*, L. R., 7 Exch. 240, is approved by the Supreme Court, and in New Brunswick the same has been held. See 2 *Supreme Court Rep. of Canada*, p. 423.

³ *Platt v. Minnesota Farmers' M. F. Ins. Co.* (A. D. 1877), *Albany Law Journal*, A. D. 1877, p. 483. *Day v. Ch. Oak Ins. Co.* cited, 51 Maine. See *v. Howard Ins. Co.*, 3 Gray, also cited in *Albany Law Journal*, p. 483.

¹ *Carpenter v. Taylor*, Com. Pleas, N. Y., A. D. 1856.

² *Cour de Cassation*, 19th January, 1870; *Journal du Palais*, A. D. 1871, p. 239.

³ *Jewell v. Stead*, Q. B., England, A. D. 1856.

⁴ Hill, 122.

⁵ 20 *Barbour*, 497.

A man insures £1,000 on his house and £500 on his furniture in that house. The obligation of the insurers may be indivisible or divisible, according to circumstances. If the house be described as covered with slates, whereas it was covered with shingles, and it is burned, the insurers need not pay for it, nor need they for the furniture burned with it, under first clause.¹

Buildings were on two lots insured. One lot was mortgaged. The application required all mortgages to be stated. The insurance company's agent seems to have written the application. He was held the applicant's agent, for so the application itself ordered. The insurance was vitiated totally, the mortgage not being stated.²

Some policies contain a clause as to description of interest,—that if the interest is misdescribed in the application, the policy shall be void: Also, another clause as to claim sworn to (after the fire), that if false or fraudulent in any particular the policy shall be void. What is the effect in a case where by one policy many different subjects are insured, as house, furniture in it, movables elsewhere, values stated, and a rate, say, of one per cent. on all? Suppose the house not to belong to the insured. Is his total policy null? *Seem*, it ought not to be. Can it be said that the risk is greater of a house not belonging to assured? It ought to be held that the policy did not mean it, and is divisible. Then, suppose the same case, but all to belong to the assured, and, after the fire, the claim contain a fraudulent statement of some of the loss (*e.g.*, some subject alleged lost that was not, or values of some of the movables sworn to at double their values), ought the whole policy to be avoided? It would seem that it ought, if it contain a clause to that effect. Again, suppose the same as the last insurance, and a clause to read—If coal oil or benzine be used in the house insured, this policy to be void. Ought the total policy to be avoided if coal oil be used? In France they lean against divisibility.³

¹ Agnel, p. 64, Arrêt of 1851.

² *Bleakley v. Niagara Dist. Mut. Ins. Co.*, 5 Bennett's Fire Insurance Cases, p. 277.

³ Pouget's Table, p. 13. And see Pouget, p. 94, Toulouse and Bordeaux. *Dechéance*, for inexecution of

A house is described as covered with slate or built of brick, when one or the other is not the case, the policy is null even as to movables in it.

A policy providing that the application should be the basis of the contract, contained a statement of the value of the goods insured. Held, that this statement was a warranty, and that the direction of the judge, that it was only a representation, was error.¹

§ 203. *Misdescription sometimes immaterial.*

In Lower Canada trivial discrepancies in description will not avoid a policy. Mere omissions to mention things, without fraud, will not avoid policy. But what of policy condition? Not mentioning a door of communication between two buildings will not necessarily avoid a policy, unless it was fraud that led to the non-mentioning of the door, and the fire extended through that door and increased the loss.

Where the insurers plead fraudulent concealment in the description of buildings insured, or the non-mentioning of a door between two buildings, they must prove fraud and not merely the misdescription.²

In *Friedlander v. London Assurance Co.*³ goods were described as in the dwelling-house of the insured, but he had but one room as a lodger where the goods were kept; but it was held that they were well described within the condition, which required that the houses, buildings or other places where goods are deposited shall be truly and accurately described: it was considered that such condition related to the construction of the house and not to the interest of the party.

In a case in Illinois⁴ an insurance was effected on buildings so much, on fixtures so much. There was double insurance on the

clauses, applies to movables as well as houses. If a claim sworn to, be falsely exaggerated the whole policy falls: Paris, 6th March, 1850. A policy is indivisible by its nature, says Pouget, p. 77; so it is null as to houses insured where the value of movables only is falsely exaggerated.

¹ *Babbitt v. Liverpool, London & Globe Ins. Co.*, 5 Bennett. The contrary was judged in *Owen's case*, 3 Bennett, 554. It is well to refer in the policy to the application, for see 5 Bennett, p. 434.

² *Casey v. Goldsmid*, 4 L. C. R.

³ 1 Mood. & Rob. 171.

⁴ 5 Am. Rep. (A. D. 1872).

latter. It was asked that the policy be nullified only *pro tanto*, and judgment was rendered accordingly.

In *Somers v. The Athenæum Fire Ass. Co.*¹ it was held that where the insurer's inspector makes a visit and diagram, and a policy upon that describes a house as detached, which really is not, and two tenants where there were four insured, he shall nevertheless recover; error will be presumed and the insurer blamed. The company in vain argued that plaintiff had been negligent, and that misdescription, whether by negligence or fraud, vitiates the policy. The Court held that the plaintiff had accepted a policy with an error in it, which he had not perceived, and had done no more; and the agent was held to be competent to prove the assured's case.

If a condition of a policy provide that the insurer's surveyor shall be held the applicant's agent and surveyor as well as the insurer's, the applicant will be affected by errors and misdescription in a survey or plan.²

If there be interrogatories in the application unanswered, and the policy have been granted notwithstanding, the omission is immaterial.³

If a survey or description be a part of the policy and a warranty, they must be regarded so. It cannot be left to the jury in such a case whether the non-correspondence with the survey or description increased the risk or not.⁴

The assured is responsible for material representations, whether before the policy, leading to it, or at the time the insurance is obtained. Phillips, vol. 2 (ed. of 1854). Representations need not be in writing. *Ib.*, § 545.⁵

Art. 2487 of the Civil Code of Lower Canada says that misrepresentation or concealment, either by error or design, of a fact of a

nature to diminish the risk or change the object of it, is a cause of nullity.

Art. 2570 says, representations not contained in the policy or made part of it, are not admitted to control its construction or effect.

A promissory representation Duer holds to be equivalent to a warranty. It has been held in some cases that representations promising things must be in writing.

Can the application be referred to? It is certainly equivalent to parol representation, and if false, the policy is null if materiality be seen and found by the jury.

A person insured stating that there was a prior insurance of \$3,000 on the same subject, where really it was only of \$2,500. Held, that this was not a misrepresentation affecting the risk, but that the insured was to be considered as his own insurer to the extent of the \$500 difference; the insurer getting, so, the full benefit of the statement made.¹

Suppose a man takes a fee simple deed of sale to him of land and house as security, may he not call himself owner for insuring?

In Louisiana, the Court held a policy void because the insured did not communicate to the underwriters the fact of a rumor of an attempt to set fire to the building adjacent to the one on which he requested insurance.²

In the following case the misdescription was held immaterial. Buildings were described as of brick and slated roof; but one was covered with tarred felt (not burnt). This roof was not easy to be seen, buried up as it were inside of other buildings and walls, and if the error was material, it was made by the company's agent, and the insured was not responsible.³

Of course, if a description is in the form of a warranty, it must be true, or the policy is void.⁴

¹ *Hood v. Farmers' Mut. Ins. Co.*, Vermont, A. D. 1857.

² *Walden v. Louisiana Ins. Co.*, 12 La. R. 135.

³ *In re Universal Non-Tariff F. Ins. Co.*, *Forbes & Co.*'s claim (1875). The agent had inspected and made report to his company. The company relied on *Newcastle F. Ins. Co. v. McMorran*, and *Anderson v. Fitzgerald*; but this case was held different, for the insured here never was called upon for any representation.

⁴ *Newcastle Ins. Co. v. McMorran*.

¹ 9 L. C. Rep.; 3 L. C. Jurist.

² *Sutton v. Montgomery Co. M. I. Co.*, 9 Barbour's R.

³ *Hall v. People's, &c.*, 6 Gray.

⁴ *The Market F. Ins. Co. of New York v. Leroy*, 12 Tiffany R. (N. Y.)

⁵ Mistakes or misrepresentations towards the policy do not avoid the policy in New Hampshire, unless fraudulent. See Albany Law Journal, 1st volume of 1880, p. 97.

Anderson v. Fitzgerald was a case of false representations (two) by the insured. The policy was void from the beginning.

The true principle is stated in *Smith's Mercantile Law* (8th ed., p. 405). If the description be substantially correct, and a more ample description or more accurate description would not have varied the premium, the error is not material.

In the case of *Gouinlock v. The Manufacturers & Merchants' Mut. Ins. Co. of Canada*,¹ the question was put, For what purposes occupied? The answer was, "Dwelling, &c." This was held to mean "*et cetera*," and a drinking saloon was held covered. Yet the Ontario statute orders insurance to be of no force if the insured describe the subjects insured otherwise than they really are.

Where the policy required certain facts to be stated in the application by the assured, and these are made known to the company's agent, who omits to reduce them to writing, the company is liable.²

In the case of *Universal Non-Tariff Fire Ins. Co. and Forbes' claim*,³ an insurance agent in Glasgow for a London company, to whom the assured applied for insurance with the Universal Non-Tariff Company (which agent represented himself as agent for the company), inspected the buildings proposed for insurance. The insurance agent was an agent for several companies, and he received a commission from the Universal Non-Tariff Company on Forbes' insurance. Forbes paid to him and got a policy from him. The company denied his being their agent, and styled him a correspondent. He inspected the buildings, and sent particulars to the head office. Misdescription was pleaded, too. The buildings were described as built of brick and slated. One, insured for £200, was not burnt, however. It was covered with tarred felt. Forbes never signed any representation about the roofs, but the company's agent alone did so, and it was put in the policy. It was held by Malins, V. Ch., that

the misdescription was not material, and even if it were so, it was made by the company's agent, and Forbes was not to be considered responsible for it.

In *Rohrbach v. Germanus F. Ins. Co.*¹ there was a condition that any person, other than the assured, who may have procured this insurance to be taken, shall be deemed the agent of the assured, and not of the company under any circumstances. The assured made application to the company's agent who filled up the application, and the insured signed. Held, that the agent was agent only of the insured.

A condition was contained in a policy, that if an agent of the company fill up the application he shall be held to have done so as agent of the applicant, and not of the company. A misdescription was held fatal, and the above condition was held not unreasonable nor against the Ontario statute.²

§ 204. Declaration of intention affecting risk.

Language in a policy declaring intention to do or omit an act which materially affects the risk, its extent, or nature, is sometimes to be treated as involving an engagement to do or omit such act.³

The insurance was on a factory. Plaintiff answered the question "During what hours is the factory worked?" as follows: "We run the cards, pickers, etc., day and night; the rest only twelve hours daily. We only intend running nights until we get more cards, etc., which are making. We shall not run nights over four months." Held, an agreement to cease running upon receiving the cards.

But the insurers may be estopped from setting up a breach of warranty, or a misre-

¹ 62 N. Y., 5 Bennett's F. Ins. Cases, p. 744.

² *Snoden v. Standard Ins. Co.*, 44 Q. B. R., Ont., p. 95 (A. D. 1879).

³ *Bilbrough v. Metropolis Ins. Co.*, 5 Duer's Rep., N. Y., 1858. This can be maintained only by reason of an express promise being seen, says Flanders.

Per Hoffman, J.—*Murdock v. Chenango Mut. Ins. Co.* has gone far to dissipate the error of Ch. Walworth in *Alston's case*, and of Wilde, J., in *Bryant v. Oc an Ins. Co.* In *Murdock's case*, There will be a stone chimney built, was in the application, which was a warranty under condition of policy. The insured lost. *Alston's case* is cited (and *Bryant's*, too) without disapproval, p. 254. See § 297, where Gray, J., supports the *Bryant case*.

¹ 43 Q. B. R., Ontario.

² *Commercial Ins. Co. v. Spaukneble*, 4 Am. Rep. Illinois case of 1869.

Is not *Parsons v. Bignold*, 15 L. T. (N. S.) Chancellor, to the same effect?

³ Law Rep. 19 Eq. (A. D. 1875); Bennett's Insurance Cases, vol. 5.

presentation on the part of the insured, as a defence to an action on the policy, by having, with a full knowledge of the breach, laid assessments upon the premium note of the insured; *aliter*, if they were not aware of the breach.³

In *Howard F. Ins. Co. v. Bruner*⁴ the insurance company was held estopped from setting up breach of warranty (arising from misdescription) by proof that the description had been prepared by its agent, with knowledge of everything.

§ 205. *Insertion of representations in the policy.*

By the law of France, says Duer, all representations must be inserted in the policy. This is thus stated by Pothier: "The policy contains the conditions. Unless expressed, one party cannot impose conditions upon the other, who disagrees, and denies them. They shall be reputed 'Comme n'ayant pas été convenues,' and shall not be established otherwise than by the policy."

Semble, by the law of Lower Canada representations before policy must be written in the policy.

It would be wise to order so all over the world. Even fraud alleged is nothing; had fraudulent representations been made, they would only have been more plainly proved had there been a writing. The door is open to great frauds against the assured by the contrary doctrine, and perjuries are invited. Yet conditions (Merlin says) may be (in contracts) express or implied.

There is no adjudged case in which it has yet been explicitly acknowledged that the rule of evidence in relation to policies is different from that which prevails in regard to other written agreements, says Duer, Lect. 14, note 3. On the contrary, the fact is denied, he says.

It would have the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected, said the Court in *Weston v. Ames*.⁵

Powell v. Edmonds, 12 East's R.—Parol

evidence of what an auctioneer said at the sale of an estate, to explain an alleged ambiguity in conditions, was rejected.

Lord Ellenborough said:—"The purchaser ought to have had it put into writing at the time, if the representation then made swayed him to bid. If the parol evidence were admitted in this case, I know of no instance where a party may not by parol testimony superadd any term to a written agreement." This is very applicable in insurance.

The companies it is who seek to make out these representations generally. Now suppose the insured were to offer parol proof to restrain the effect of the policy. He would be hooted at. Yet he is as right as others in proving, as they do beyond the agreement, and deducting from it.

'Misrepresentation and fraud will often be proved by insurance companies' clerks. If the doctrine be admitted that parol evidence of misrepresentation may be received, the effect of every defence founded on a misrepresentation without fraud is to alter the construction of the policy. Per Lord Tenterden, in *Flinn v. Tobin*, 1 Moody & M.¹

In *Alston v. Mech. Mut. Ins. Co.*,² the assured promised verbally (it was said) to discontinue the use of a fireplace in the basement, and to use a stove instead. Fire happened. He had not discontinued. The Court would not allow this to be a defence to an action after a loss, the policy not mentioning such promise.

Promises for future conduct must be inserted in the policy. By parol proof the terms of a policy cannot be added to nor varied. [Two witnesses in this case proved the representation.] Clearly the loss was covered by the terms of the policy. Part of the contract had been omitted from the policy (according to defendants). If so, it ought to have been written, for it was a warranty, though called a "promissory representation" by defendants.

¹ See [25-26] Smith on Contracts, as to parol proof against writings.

² 4 Hill, 329.

³ *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154.

⁴ *Allen et al. v. Vt. Mut. Fire Ins. Co.*, 12 Vt. 383.

⁵ 11 Hun.

¹ Taunton.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Nov. 8.

Judicial Abandonments.

Arthur Demers, tinsmith, St. John's, Nov. 5.
 Louis Deschêne, trader, Rivière Ouelle, Oct. 25.
 Elzéar Fortier, boot and shoe dealer, Hull, Nov. 3.
 John McIntyre, engineer and millwright, Montreal, Oct. 24.
 Téléphore Monpas, trader, St. Jean Deschallons, Oct. 31.
 Geo. H. Moore, Aylmer, Oct. 28.
 Joseph E. Turgeon, trader, Ste. Julie de Somerset, Oct. 31.
 Geo. Rhéaume, trader, parish of St. Côme de Kennebec, Oct. 31.

Curators appointed.

Re Damase *alias* Thomas Bedard, trader, Lachute.—G. J. Walker, Lachute, curator, Nov. 3.
 Re Donathé Bonin, Joliette.—Bilodeau & Renaud, Montreal, joint curator, Oct. 23.
 Re Hubert Alfred Houde, grocer, Quebec.—H. A. Bedard, Quebec, curator, Nov. 5.
 Re John McIntyre, engineer and millwright, Montreal.—A. F. Riddell, Montreal, curator, Nov. 3.
 Re Hector Poirier, La Baie du Febvre.—F. Valentine, Three Rivers, curator, Nov. 3.
 Re James W. Wight, Montreal.—J. McD. Hains, Montreal, curator, Nov. 5.

Dividends.

Re George Baptist, Son & Co., lumber merchants, Three Rivers.—Dividend, payable Nov. 24, Macintosh & Hyde, Montreal, joint curator.
 Re Beauchamp & Co.—First and final dividend, payable Nov. 20, Bilodeau & Renaud, Montreal, joint curator.
 Re Bossé & Lee, Montreal.—First and final dividend, payable Nov. 25, Kent & Turcotte, Montreal, joint curator.
 Re Joseph Dagenais, grocer, Montreal.—First and final dividend, payable Nov. 25, T. Gauthier, Montreal, curator.
 Re Dominion Illustrated Publishing Co.—First dividend (50.), payable Nov. 10, J. B. Clarkson, Montreal, curator.
 Re Philippe A. Donais.—First dividend, payable Nov. 25, C. Desmarteau, Montreal, curator.
 Re J. H. Dubois, Drummondville.—First dividend, payable Nov. 25, Kent & Turcotte, Montreal, joint curator.
 Re Gédéon Genest, Pierreville.—First dividend, payable Nov. 25, Kent & Turcotte, Montreal, joint curator.
 Re Geo. Guay, Yamachiche.—First dividend, payable Nov. 25, Kent & Turcotte, Montreal, joint curator.
 Re D. Lanthier, Montreal.—First dividend, payable Nov. 25, Kent & Turcotte, Montreal, joint curator.
 Re L. Laurin, Montreal.—First dividend, payable Nov. 25, Kent & Turcotte, Montreal, joint curator.
 Re L. H. Mineau, Louiseville.—First and final dividend (on hypothecs only), payable Nov. 28, Kent & Turcotte, Montreal, joint curator.

Re J. D. Tellier, Sorel.—First and final dividend (on hypothecs only), payable Nov. 26, Kent & Turcotte, Montreal, joint curator.

Separation as to property.

Marie Emma Hémond vs. Michael Weston *alias* William Fullum, Montreal, Oct. 25.
 Rosianne Majeau vs. Antoine Vincent, trader, Montreal, Nov. 5.
 Marie Sophie Ricard vs. Gabrielle Caron, machinist, Montreal, Nov. 4.
 Elise Roberge vs. David Limoges, carter, parish of l'Enfant Jésus, Aug. 4.
 Onézime Taillefer vs. George Payeur, dyer and manufacturer, Montreal, Oct. 15.

GENERAL NOTES.

MANX METHOD OF TREATING PRISONERS.—Two men named Peter Thornton and Thomas Smith were, July 1, charged before the Liverpool stipendiary magistrate with having frequented the steamship *Mona's Isle* with intent to commit a felony. Detective Boyes stated that on Saturday he was a passenger on board the steamer from Liverpool to Douglas, and on arriving at his destination he noticed Thornton endeavoring to pick the pockets of several ladies, his companion acting as a shield to his movements. He took them into custody and gave them in charge of the Manx police. The prisoners were stripped of their money, watches and jewellery, and then allowed to go. They wandered about without means of sustenance until Monday, when they were sent over to Liverpool, and Boyes met them and removed them to prison. In reply to the magistrate, the prisoners said that the Manx police authorities told them that they would not be detained if they delivered up their property. Detective Boyes said that there was no likelihood of the prisoners recovering their valuables, as the Manx police invariably held possession of things belonging to prisoners taken into their custody. Smith asked what proceedings they could take in order to recover their property. The magistrate told them they had better keep away from the island. The prisoners were then discharged.

PAYING UNAUTHORISED AGENTS.—In the City of London Court, on September 5, before Mr. Commissioner Kerr, the case of *Coral v. Allen* was heard, in which the plaintiff, a wholesale confectioner, sued the defendant to recover payment of an account for goods supplied. The defendant said he had paid the plaintiff's authorized agent. The plaintiff said the defendant had instructions only to pay with a written authority. The defendant said the agent produced the plaintiff's authority, but this the plaintiff said was a forgery. The agent had since left his employment. Mr. Commissioner Kerr said that raised a very fine but very important point to all men in business. The defendant had paid the debt on a forgery of the plaintiff's authority. He was afraid that, while it was a very hard case on the defendant, he must pay it over again. It was a serious warning to all men to be very careful in making payments. There would be judgment for the plaintiff, with costs.

The Legal News.

VOL. XIII. NOVEMBER 22, 1890. No. 47.

Mr. Fitzpatrick, the member for Quebec county, has introduced a bill in the legislative assembly, which will test opinion on the question of admitting the parties to a suit to give evidence on their own behalf. The proposed amendment of the law aims at the replacement of Art. 1232 of the Civil Code by the following:—

"1232. Any party to a suit may give testimony on his own behalf.

A witness is not rendered incompetent by reason of his being a party, of relationship, or of being interested in the suit; but his credibility may be affected thereby."

The law at present reads:—"Testimony given by a party in a suit cannot avail in his favor. A witness is not rendered incompetent by reason of relationship or of being interested in the suit; but his credibility may be affected thereby." The proposed amendment would also affect Art. 251 of the Code of Procedure, which reads as follows:—"Any party to a suit may be subpoenaed, examined, cross-examined, and treated as any other witness; but his evidence cannot avail himself; the adverse party may however declare, before he closes his proof, that he does not intend to avail himself of his testimony, and in such case it is deemed not to have been given." This article it is proposed to replace by the following:—

"251. Any party to a suit may give testimony on his own behalf and in such case be examined, cross-examined, and treated as any other witness.

He may also be subpoenaed and treated as a witness by the opposite party, and, in such latter case, his answers may be used as a commencement of proof in writing."

Canada, usually notably free from serious crime, as a flourishing and progressive community ought to be, has lately had five criminals under sentence of death for murder at one time. In two instances, however, the convict was only transiently within the borders of the Dominion. In one of them, the *Birchall* case, the penalty of the law has been inflicted, and a blow has been dealt at the

dastardly practice of inveigling English youths to this country to defraud, and perchance to murder them. The Minister of Justice is to be commended for his firmness in this case, for a good many persons, including some who ought to know better, signed the petition for commutation. Something may be said for the abolition of the death penalty altogether, but the impropriety of capital punishment is urged unseasonably when it is put forward as a plea for the commutation of the sentence of a scoundrel specially destitute of conscience, and for whom penitence has no meaning.

Some of the simplest, and apparently the plainest expressions, often give rise to difficulties of interpretation. Take, for instance, the word "from." This was passed upon judicially in a recent case, *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, in which the question was as to the duration of an accident policy for a year "from" a certain date. The assured had paid the defendants the premium "for twelve calendar months from the 24th day of November, 1887." An accident occurred on the 24th day of November, 1888. Was this within the year? The English Queen's Bench division, Oct. 29th, 1890, (Justices Day and Lawrence) held that the policy covered Nov. 24th, 1888. As the *Law Journal* puts it, "from" is *prima facie* an exclusive term, so that if in a contract any right is to continue under it for a certain period "from" a given day, that day is to be excluded, but the term is not so unambiguously exclusive as not to be susceptible of an inclusive construction if there be anything in the context to show that an inclusive meaning was intended by the parties. Such is the effect of *Pugh v. The Duke of Leeds*, 2 Cowp. 714, and *Wilkinson v. Gaston*, 9 Q. B. 137, in both of which cases "from" was construed as inclusive. In the recent case, however, the Court held that there was nothing in the context to avoid the operation of the ordinary rule.

Some time ago, Mr. Justice Stephen expressed the opinion that eloquence had left the bar. This enunciation has been challenged by Chief Justice Coleridge. Address-

sing the Lolesworth Club, the Lord Chief Justice observed:—"It was said that eloquence had left the Bar, only lingered in Parliament, and was almost leaving the pulpit. But he had listened at the bar to Sir Alexander Cockburn, to Bethell, to Lord Cairns, and to the greatest of all the advocates who in his time had adorned the profession, and was supreme in the art of forensic speaking, Sir William Earle, and he had no doubt that all these great men would agree with him in dissenting from that proposition so far as the bar was concerned." But the *Law Times* somewhat maliciously remarks:—"Those were days when judges appreciated eloquent diction. Judges of to-day do not. The dry facts of cases wrapped up in the most modern decisions (or, better still, without the decisions) prove most acceptable to the courts of law of to-day. And if Lord Coleridge had had to furnish living instances, to catalogue with Earle and Cockburn, his task would have been a difficult one, but soon concluded."

COURT OF QUEEN'S BENCH—MONTREAL.*

Charitable association—C. S. C. ch. 71—Division among members—Disposal of assets.

The majority of the members of a Friendly Association constituted under C. S. C. ch. 71, being expelled from the association, met in another place, and organized themselves for objects similar to those of the original association, but taking a different name. The trustees of monies belonging to the old association were among this number. In an action, brought in the name of the old association, calling on the trustees to account:

Held:—(RAMSAY, J., *diss.*), That the members of the new association, although they had changed the name of the society, constituting as they did a majority, and the members claiming to be the old association being a minority, the latter were not entitled to demand the monies in the hands of the trustees.—*Court Mount Royal & Boulton*, Dorion, Ch. J., Ramsay, Tessier, Cross, Baby, JJ., Nov. 22, 1881.

* To appear in Montreal Law Reports, 6 Q. B.

Carrier—Responsibility—Railway Company—Person conveyed contrary to Company's regulations—Collision—Damages.

Held:—That where a person, by giving a tip or bribe to the conductor of a train not intended for the conveyance of ordinary passengers, as he had reason to know, induces the conductor of such train to permit him to travel on the train contrary to the regulations of the railway company, he travels at his own risk; and if, while so travelling, he is injured by a collision, he is not entitled to be indemnified by the company for any damage to person or property sustained by him.—*Canadian Pacific R. Co. & Johnson*, Dorion, Ch. J., Cross, Baby, Bossé, JJ., March 20, 1890.

Sale of goods by weight—Contract, when perfect—Art. 1474, C. C.—Damage to goods before weighing.

Held:—Reversing the judgment of TORRANCE, J., (M. L. R., 2 S. C. 395), TESSIER and BOSSÉ, JJ., dissenting, That where goods and merchandise are sold by weight, the contract of sale is not perfect and the property of the goods remains in the vendor, and they are at his risk, until they are weighed, or until the buyer is in default to have them weighed; and this is so, even where the buyer has made an examination of the goods, and rejected such as were not to his satisfaction.—*Hannan & Ross*, Dorion, Ch. J., Tessier, Cross, Bossé, Doherty, JJ., May 23, 1890.

SUPERIOR COURT—MONTREAL.*

Procedure—Art. 421, C.C.P.—Motion for judgment on verdict.

Held:—1. That the delay of "four days in term" mentioned in Art. 421, C.C.P., means four days of a term of the Court of Review.

2. That as motions for new trial or for judgment *non obstante veredicto* need not be made till the second day of the next term of the Court of Review following the tenth day after the rendering of the verdict, the party who has the right to make such motions can have the motion for judgment on the verdict continued till the last day of the aforesaid

* To appear in Montreal Law Reports, 6 S.C.

delay if he demands it.—*Roy v. Canadian Pacific Railway Co.*, in Review, Johnson, Gill, Würtele, JJ., Oct. 23, 1889.

Costs—Interest on.

Judgment was rendered in February, 1889, in favor of plaintiff in the Superior Court, costs reserved. Upon appeal to the Court of Queen's bench, the judgment was reversed in November, 1889, and the action was dismissed with costs of both Courts in favor of defendants.

Upon taxation of the bill, defendants pretended that under Arts. 3598 and 5904, Rev. Stat., Quebec, interest was due on the Superior Court costs from the date of the judgment of the Superior Court, on the ground that the Queen's Bench judgment reversing was the judgment which the Superior Court ought to have rendered, and should be taken *nunc pro tunc*.

Held:—That interest was due on the Superior Court costs only from the date of the judgment of the Court of Queen's Bench.—*Fraser v. McTavish*, Mathieu, J., Jan. 10, 1890.

Jurisdiction—Licenses—R. S. Q. 1031, 1046—Action for amount not exceeding \$200.

Held:—1. That although the jurisdiction of the Superior Court has been extended generally to actions between \$100 and \$200, which were formerly in the jurisdiction of the Circuit Court, Art. 1031 R.S.Q. which restricts the jurisdiction of the Superior Court, in actions for the recovery of fines and penalties under the License Act, to amounts exceeding \$200, constitutes an exception to the general rule, and therefore the Superior Court has no jurisdiction in an action for penalties to the amount of \$150.

2. Where the Superior Court exercises a jurisdiction not pertaining to it, such judgment is subject to review by the Court sitting in Review, and the absence of jurisdiction of the Court below may be raised for the first time when the case is in Review.

3. The depositions of witnesses, in actions for penalties for offences against the License Act, need not be taken in writing, unless there be a demand by one of the parties (R. S. Q. 1046).—*Crépeau v. Lafortune*, in Review, Johnson, Loranger, Würtele, JJ., April 30, 1889.

School discipline—Art. 245, C.C.—Reasonable and moderate correction.

Held:—That in the exercise of the right of "reasonable and moderate correction" permitted to the schoolmaster *in loco parentis* by Art. 245, C.C., no punishment is justifiable which may result in serious or permanent bodily injury to the pupil; and therefore where a teacher dragged a child of seven years by the ear, to compel him to kneel down, and the ear was so injured as to require medical attendance during several weeks, the school authorities were condemned to pay \$50 damages, with costs of an action of \$200.—*Lefebvre v. La Congrégation des Petits Frères*, Davidson, J., Oct. 9, 1890.

Patron—Ouvrier—Renvoi—Damage.

Jugé:—Qu'un ouvrier engagé pour un temps fixé et à prix fait, qui est déchargé, sans raison suffisante, avant l'expiration de son engagement, a une action en dommages contre son patron, et que la mesure des dommages, dans ce cas, est le montant du salaire convenu pour tout le terme de l'engagement à partir de la date du renvoi.—*Bonneau v. Montreal Watch Case Co.*, Loranger, J., 12 mai 1890.

Prêt—Société—Action résolutoire—C. C. Art. 1831.

Jugé:—1o. Une convention par laquelle une des parties prête à l'autre une somme d'argent pour l'exploitation d'une entreprise commerciale, avec stipulation de participer dans les profits, ne constitue pas nécessairement un acte de société entre les parties contractantes.

2o. Quoique, d'après les termes de l'Art. 1831, C. C., et la jurisprudence, une telle convention entraîne avec elle la responsabilité de toutes les parties contractantes comme associés envers les tiers, néanmoins, si les droits des tiers ne sont pas en jeu, l'intention des parties doit déterminer si elles ont fait un contrat de prêt ou de société.

3o. Un acte rédigé dans les termes cités plus bas constitue un prêt et non un acte de société, et le prêteur a droit d'exiger le remboursement de son argent prêté dans une

action résolutoire tendant à faire annuler la convention.—*Rinfret v. May, Taschereau, J.*, 5 mai 1890.

Municipalité—Livres de comptes—Heures de bureau.

Jugé.—10. Que les livres de comptes du secrétaire-trésorier de toute ville régie par le chapitre 1er du Titre XI des Statuts Refondus de Québec, les pièces justificatives de ses dépenses, de même que tous les registres et documents en sa possession comme archives du conseil, doivent être tenus ouverts à l'inspection de tout contribuable, les jours de bureau entre neuf heures du matin et quatre heures de l'après-midi;

20. Qu'une résolution du conseil municipal d'une telle ville, fixant les heures de bureau de son secrétaire-trésorier de sept heures à dix heures du soir, est illégale, et sans effet comme contraire à l'Art. 4343 Statuts Refondus de la province de Québec.—*Vermette v. Ville de la Cote St. Louis, Würtele, J.*, 8 juillet 1890.

DECISIONS AT QUEBEC¹

Répétition de l'indu—Arts. 1047, 1048, C. C.

Jugé.—Le curateur à une substitution qui, pour dégager des valeurs appartenant à la substitution et transportées à une banque par son prédécesseur, comme garantie accessoire du remboursement d'un emprunt fait pour son usage personnel, paie la somme ainsi empruntée, ne peut ensuite poursuivre la banque en répétition de l'indu. Des trois conditions nécessaires pour donner naissance à ce recours, savoir, le paiement, l'absence de dette et l'erreur dans le paiement, les deux dernières font défaut dans ce cas.—*Petry v. La Crisse d'Economie, C.S., Larue, J.*, 1 oct. 1889.

Saisie-arrêt—Agent—Compensation.

The respondents, judgment creditors of one C. (defendant), took a seizure by garnishment in the hands of appellant, a notary, who declared that he owed C. nothing. On contestation of the declaration it appeared that appellant was bearer, as agent or attorney of the heirs D., of certain debentures, payable

to bearer, on which arrears of interest were due; that a dividend on account of such arrears was declared and payable at the time of the garnishee's declaration, and was actually thereafter paid to him, and that C. was owner, to appellant's knowledge, of one half such arrears by transfer from certain of the heirs. It further appeared that C. was indebted to the heirs D. in a larger sum of money, which appellant set up in compensation against any sum he might, as their agent, have received for C.

Held.—That the attachment so made of C.'s monies in the hands of appellant was good and valid, appellant occupying *quoad* C. the position of a third party, within the meaning of Art. 612, C.C.P., in whose hands an attachment could legally be effected. The compensation set up by appellant was a right which could be urged only by the heirs themselves, and not by their agent or attorney.—*Marcoux & Merchants Bank*, in appeal, *Dorion, C.J., Cross, Baby, Bossé, J.J.*, (Cross, J., *diss.*), May 6, 1890.

Plainte insuffisante—Énonciation de l'offense—Compétence des Juges de Paix—Certiorari.

Jugé.—Une plainte contre un aubergiste "pour avoir tenu ouverte illégalement et n'avoir pas fermé, après minuit, la maison dans laquelle il était autorisé à vendre en détail des liqueurs enivrantes, etc." n'énonce pas une offense prévue par la loi, et les juges de paix ne sont pas compétents à en prendre connaissance. La conviction déclarant que le défendeur a été trouvé coupable "d'avoir tenu ouverte illégalement et de n'avoir pas fermé, après minuit et jusqu'à cinq heures du matin, la maison, etc." ne peut pas remédier à l'insuffisance de la plainte.

2. Une disposition statutaire qui enlève le recours par voie de *certiorari*, dans la version française étant restrictive, est non avenue si elle est contredite par la version anglaise du statut.

3. Lors même que le *certiorari* est enlevé expressément, il doit être accordé pour défaut de juridiction dans le tribunal inférieur.—*Nadeau v. Corporation de Lévis, C.S., Larue, J.*, 22 fév. 1890.

¹ 16 Q. L. R.

Saisie-arrêt en mains tierces—Insolvabilité du défendeur—Dépôt en Cour de la somme saisie pour distribution entre les créanciers.

Jugé :—Le jugement rendu sur une contestation de la déclaration d'un tiers-saisi, qui condamne ce dernier parce que, lors de la signification de la saisie-arrêt, il avait en mains une somme d'argent que le défendeur, en état de déconfiture à sa connaissance, lui avait payée par préférence frauduleuse à ses autres créanciers, ne peut pas attribuer le montant de la condamnation au demandeur saisissant et contestant ; mais doit ordonner le dépôt de cette somme au greffe pour distribution entre les créanciers du défendeur.—*Lacourrière v. Lefebvre*, en révision, Casault, Routhier, Andrews, JJ., 28 fév. 1890.

Pétition de droit—Amendement—Sentence arbitrale—Acquiescement conditionnel.

Jugé :—1. Lorsque le lieutenant-gouverneur a ordonné que *droit soit fait* sur une pétition de droit, le tribunal qui en est saisi peut permettre qu'elle soit amendée, et il n'est pas nécessaire, après un tel amendement, qu'elle soit soumise de nouveau au lieutenant-gouverneur ;

2. Une partie à un arbitrage qui accepte conditionnellement le montant de la sentence arbitrale, acquiesce par là même à cette sentence, et est liée par elle tant que la condition à laquelle elle a accepté ne se réalise pas ;

3. La condition à laquelle un entrepreneur, qui a soumis sa réclamation contre le gouvernement de la Province à des arbitres (d'autres entrepreneurs étant dans le même cas et ayant fait de même) accepte le montant de la sentence étant "that if from any cause the government should conclude to re-consider or re-open to any contractor the matters in dispute, or any award or claims made by them the same privilege will be extended to you," n'est pas réalisée par le fait qu'un de ces autres entrepreneurs a obtenu du lieutenant-gouverneur un ordre que *droit soit fait*, sur une pétition de droit qu'il a présentée pour faire valoir sa réclamation.—*McDonald v. Reg.*, C.S., Caron, J., 27 mai 1890.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

[Continued from p. 367.]

§ 206. *Misstatement in Application.*

In *Houghton v. Manufacturers Ins. Co.*,¹ the insured was insured after an application, which had annexed to it various questions, to which answers were expected. The policy contained a condition that if any representations in the application were not true (so far as material to the risk), or if the circumstances affecting the risk should be changed without consent of the assurer, so as to increase the risk, the policy shall be void.

To one question the insured answered, "No watch is kept in or about the building, but the mill is examined 30 minutes after work."

1. Application and answers held part of the policy. 2. Answers held representations rather than warranties ; 3. Further held that the representation as to practices observed and the precautions taken to guard against fire amounted to a stipulation that such modes should continue to be adopted during the term of insurance ; and a discontinuance of them would render the policy void under the proviso therein respecting alterations or changes in circumstances affecting the risk. The mill was worked extra hours sometimes ; then the insured was bound to have examination made 30 minutes after that extra work. § 153, Angell.

In New Hampshire, by Genl. St. ch. 157, *misstatement* in application will not avoid policy if unaccompanied by fraud, and knowledge of insurer's agent of insured's true title, is waiver of condition in policy avoiding it for inaccurate statement.—*Id.*

"A watchman kept on the premises," in the description, &c., in the policy, makes a warranty ; per Shaw, C.J., in *Crocker's case*.² But that does not involve a constant watch, says the Chief Justice. What is meant ? says the Chief Justice. His answer is : "What is usual, reasonable watching, as much as cus-

¹ 8 Metcalfe, 114.

² 8 Cushing.

tomary in like establishments, evidence of usage must be admitted."

In the *Glendale* case, the question was put:

"During the night, is there a watchman?"

A.—There is a watchman nights. This was held to mean during night—always. That involved more obligation than *Crocker's* case (so the two decisions may stand).

§ 142, Angell says the application with questions and answers forms part of the policy. Is there a watchman in the mill during the night? Answer—"There is a watchman nights." The mill was burnt at night while no watchman was there. Held, a warranty broken, very properly. *Glendale Manufacturing Co. v. Prot. Ins. Co.*¹

This is better law than that in 22 Conn. R. *Shelden v. Hartf. F. I. Co.*, or than the case in which the policy, stipulating "Watchman kept on the premises," did not require the constant keeping of a watchman; but only at times as men ordinarily careful kept, &c.; *Crocker v. Peoples M. F. I. Co.*, 8 Cushing, R. (in which usage of similar establishments was, improperly, allowed to be proved).

In the questions and answers before policy, "watchman to be kept at all times," &c., was promised. The sheriff seized the mill and locked it up, and the day after, it was burned. So the warranty about the watchman was not kept. The Court held the sheriff's seizure to be no excuse.²

The Court of Appeal of Ontario seem to hold that this is not a warranty for a continuance of employment of a watchman. *Worswick v. Canada Fire and Mar. Ins. Co.*, 3 Ontario App. Rep. of 1879.

A continuous practice to keep is not warranted here; it is a mere statement of a fact then existing. *Grant v. The Aetna*, so held in P. C. Many American cases hold it constructive warranty. *Ripley v. Aetna Ins. Co.*, 30 N.Y. See what is said in *Kentucky and Louisville Mutual Ins. Co. v. Southard*, cited in *May*, sec. 163. But if that description be given, and a condition prohibiting any change material to the risk, the withdrawal of the watchman would avoid the policy, *per Moss*, Ch. J., in *Worswick's* case; and this condition may be with a qualification, by addi-

tion of words such as "within the control or knowledge of the 'insured.'"—*Ib.*

Is there a watchman at night? Is the mill ever left alone? *Ans.*—No regular watchman, but one or two hands sleep in the mill. Held, a continuing warranty, under a warranty policy. *Blumer*, appellant *v. Phoenix Ins. Co.*, respondent (Wisconsin), 33 Am. R., A.D. 1879. The insurance company gained.

Though the present tense be used in such cases, warranty may often be seen. See notes on page 832, 33 Am. R. Yet the Courts do so only where the words and terms are such that no other construction is reasonable.

Where a policy describes house insured, and mentions how tenanted, and adds "not to be used as a coffee house," this makes a warranty, substantially; if a coffee house be established there, the policy will be avoided. So judged in a case in Missouri in 1852, Vol. 28, Hunt's M. Mag., *Lawless v. Tennessee M. & F. I. Co.* Would user as a coffee house, though discontinued before the day of the loss, avoid? *Seemle*, it would.

If by a policy the assured warrant to cease distilling, (or, *seemle*, use of a furnace; or use as a coffee house,) by a certain day, and do not, but do cease at a later date, but before the day of the fire; yet, if afterwards a fire happens, the insurers are free. (The insured kept secret an augmented risk during a time.) 1st part, p. 344, Dalloz of 1856; and insurance in such case will be avoided as well as regards a building, as moveables in it.—*Ib.* And in 10 East's R. there is a case where a man insuring goods on a ship said she was to sail in a few days. She did not sail that month, yet he was held to have only represented what he believed about her time (intended) for sailing. That was a case of an owner of goods insuring in a ship not his, or under his control.

In *Bize v. Fletcher*,¹ the vessel insured was represented in writing as having had a complete repair, &c., and "intends to sail in September or October." She did not sail till 6th December; yet insurers, fighting the insured, did not pretend even that there had been a warranty to sail in September or October, and that that warranty had been broken.

¹ 21 Conn. R.

² *First National Bank of Ballston Spa v. Ins. Co. of N.A.*, 7 Albany Law J., p. 187.

¹ 1 Dougl.

Again, in *Bize v. Fletcher* it was held that the insured might change his declared intention, as to course of a voyage, and go to Bengal.

WHIPPING AS A PUNISHMENT.

The first mention of whipping as a punishment occurs in the fifth chapter of Exodus, where we find that Pharaoh whipped the officers of the Israelites, when they did not furnish the required number of bricks which they were compelled to make every day.

In ancient times the Romans carried whipping, as a punishment, farther than any other nation, and their judges were surrounded with an array of divers kinds of whips well calculated to affright the offender who might be brought before them. The mildest form of whip was a flat leather strap, called the *ferula*; and one of the most severe was the *flagellum*, which was made of plaited ox-hide and almost as hard as iron.

Not only was flagellation in various forms used as a judicial punishment, but it was also a common practice to punish slaves by the same means. The Roman ladies were greater offenders and even more given to the practice of whipping their slaves than the men; for in the reign of the Emperor Adrian a Roman lady was banished for five years for undue cruelty to her slaves. The practice of whipping was in fact so prevalent that it furnished Plautus, in several cases, with incidents for his plots. Thus, in his "*Epidicus*," a slave, who is the principal character in the play, concludes that his master has discovered all his schemes, since he saw him in the morning purchasing a new scourge at the shop where they were sold.

From ancient times the use of whipping can be traced through the middle ages, down to, comparatively speaking, more modern times, when it is easier to find records of the use of the rod.

In Queen Elizabeth's time the whipping-post was an established institution in almost every village in England, the municipal records of the time informing us that the usual fee to the executioner for administering the punishment was "fourpence a head." In addition to whipping being thought an excellent corrective for crime, the author-

ities of a certain town in Huntingdonshire must have considered the use of the lash as a sort of universal specific as well, for the corporation records of this town mention that they paid eight pence "to Thomas Hawkins for whipping two people that had the small-pox."

In France and Holland whipping does not seem to have been so generally practised. The last woman who was publicly whipped in France by judicial decree, was Jeanne St. Remi de Valois, Comtesse de la Motte, for her share in the abstraction of that diamond necklace which has given point to so many stories.

In connection with the history of flagellation in France may be mentioned the custom which prevailed there (and also in Italy), in olden times, of ladies visiting their acquaintances while still in bed on the morning of the "Festival of the Innocents," and whipping them for any injuries, either real or fancied, which the victims may have done to the fair flagellants during the past year. One of the explanations given for the rise of this practice is as follows: On that day it was the custom to whip up children in the morning, "that the memory of Herod's murder of the innocents might stick the closer, and in a moderate proportion to act the cruelty again in kind." There is a story based upon this practice in the tales of the Queen of Navarre.

Among the Eastern nations the rod in various forms plays a prominent part, and from what we read China might be said to be almost governed by it. Japan is singularly free from the practice of whipping, but makes up for it by having a remarkably sanguinary criminal code.

Russia is, however, *par excellence*, a home of the whip and the rod, the Russians having been governed from time immemorial by the use of the lash.

Many of the Russian monarchs were adepts in the use of the whip, and were also particularly ingenious in making things unpleasant for those around them. Catherine II was so particularly fond of this variety of punishment (which she often administered in person), that it amounted almost to a passion with her. It is related that she carried this

craze so far that at one time the ladies of the court had to come to the Winter Palace with their dresses so adjusted that the Empress could whip them at once if she should feel so inclined.

While the instruments of torture used in Russia were of great variety, the most formidable "punisher" was the knout, an instrument of Tartar origin, and of which descriptions differ. In its ordinary form it appears to be a heavy leather thong, about eight feet in length, attached to a handle two feet long, the lash being concave, thus making two sharp edges along its entire length; and when it fell on the criminal's back it would cut him like a flexible double-edged sword. "Running the gauntlet" was also employed, but principally in the army. In this the offender had to pass through a long lane of soldiers, each of whom gave the offender a stroke with a pliant switch. Peter the Great limited the number of blows to be given to twelve thousand; but unless it were intended to kill the victim, they seldom gave more than two thousand at a time. When the offender was sentenced to a greater number of strokes than this, the punishment was extended over several days, for the reason above stated.

Whipping, after dropping out of sight for a time in England, was re-introduced in 1867, in order to put a check on crimes of violence. The law was so framed that the judges might add flogging at discretion to the imprisonment to which the offenders were also sentenced. The first instance of this punishment being used was at Leeds, where two men received twenty-five lashes each before entering their five and ten years' penal servitude for garrotting. The whip used in this instance was the cat-o'-nine-tails.

The whipping-post is also still used in some parts of this country, notably at Newcastle, Delaware, where the "cat" is still administered for minor offences. Judging from a whipping that the writer once witnessed, it appears to be a very mild form of punishment.—*American Notes and Queries.*

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Nov. 15.

Judicial Abandonments.

- Béliveau & Archambault, importers, Montreal, Nov. 4.
 Henriette Dompierre, milliner, Montreal, Nov. 8.
 Evariste Gélinas, boot and shoe dealer, Montreal, Nov. 10.
 Jean Hugues Gendron, trader, Sherbrooke, Nov. 11.
 James Jessop, trader, Newport, County of Gaspé, Nov. 5.
 Kenniburgh & Boyce, traders, Lachute, Nov. 11.
 Larivée & Raymond, fish dealers, Montreal, Nov. 8.
 Chas. A. O'Leary, contractor, Quebec, Nov. 12.

Curators appointed.

- Re Eugène Arcand, St. Césaire.—A. Girard, Montreal, curator, Nov. 8.
 Re P. Isays P. Boivin, Quebec.—N. Matte and D. Arcand, Quebec, joint curator, Nov. 7.
 Re A. & P. Bourgeois.—C. Desmarteau, Montreal, curator, Nov. 3.
 Re David Brady, plumber, Montreal.—David Seath, Montreal, curator, Nov. 5.
 Re Arthur Demers.—A. F. Gervais, St. John's, curator, Nov. 12.
 Re A. P. Desroches.—C. Desmarteau, Montreal, curator, Nov. 8.
 Re Bruno Duperré, saddler, Quebec.—H. A. Bedard, Quebec, curator, Nov. 12.
 Re Drolet & Co., boots and shoes, Quebec.—N. Matte, Quebec, curator, Nov. 5.
 Re F. X. Gagnon, trader, Quebec.—H. A. Bedard, Quebec, curator, Nov. 10.
 Re Hormidas & Wilfrid Landry, butchers, St. Scholastique.—H. Langlois, Ste. Scholastique, curator, Nov. 10.
 Re F. X. Mercier, trader, Lévis.—H. A. Bedard, Quebec, curator, Nov. 10.
 Re Louis Alarie Mongeau.—Kent & Turcotte, Montreal, joint curator, Nov. 8.
 Re Adjuitor Morissette, trader, Quebec.—H. A. Bedard, Quebec, curator, Nov. 13.
 Re Damase Pageot, trader, St. Sylvestre.—H. A. Bedard, Quebec, curator, Nov. 13.
 Re Prosper Patenande.—G. H. St. Pierre, Coaticook, curator, Nov. 10.

Dividends.

- Re David Latour.—First and final dividend, payable Dec. 2, C. Desmarteau, Montreal, curator.
 Re D. & J. Maguire.—Dividend, payable Dec. 1, M. Kennedy, Montreal, curator.
 Re L. H. Mineau, Louiseville.—First and final dividend, payable Dec. 4, Kent & Turcotte, Montreal, joint curator.

Separation as to property.

- Etudiante Dubord dit Lafontaine, vs. Louis Charrette dit Robert, trader, Montreal, Oct. 23.

The Legal News.

Vol. XIII. NOVEMBER 29, 1890. No. 48.

An impression seems to exist that the administration of justice in this province, and the efficiency of the Court of appeal, do not receive the attention which the importance of the subject deserves. This impression, unfortunately, was strengthened when the Court assembled for the November term, with only half its members and one assistant judge, to face a roll of eighty-eight cases. The effects of a weak Court were soon apparent when, in one case requiring dispatch, the Court, after a long argument, was unable to render any judgment in consequence of an equal division of opinion, and the time occupied with the case was found to be so much abstracted to no purpose from the hours available for the dispatch of business. Then, too, there was a reluctance—a very natural reluctance—on the part of counsel, to proceed with the argument of important cases which might end in a similar division of opinion, and require another hearing. This was the result of a rather unusual conjunction of untoward circumstances—the fact that two of the members of the Court were disabled at the same time by illness, and that the Chief Justice was withdrawn from his Court in order to hold the Criminal Term. A supplementary judge, it is true, was named to take the place of Mr. Justice Tessier, but the appointment was not made in time to permit him to take his seat before the close of the term. Under these circumstances the intervention of the legislature is not surprising, and a bill, we understand, has been introduced, the features of which will doubtless receive fair consideration from the many able members of the bar who have seats in the legislative body. It seems to be matter for regret that the Chief Justice should be withdrawn from the more immediate duties of his Court during a whole month, to try criminal cases which might efficiently be disposed of by some other mode. The rapid growth of population in the city and district

of Montreal inevitably brings with it a large increase of criminal business. It may be expected that this business will continue to increase. The question seems to be whether an additional judge shall be appointed to the Queen's Bench, so as to leave one member of the Court always available for the criminal terms, or whether a special criminal Court shall be created in this great centre of population, with a special judge free to devote his whole attention to the business. It is easy to suggest objections to any scheme put forward, but, in the interest of the great body of suitors, it is to be hoped that the difficulty will receive careful consideration, and that a way will be found to avoid the deadlock witnessed last month.

The authority of the schoolmaster has been somewhat restricted since the time of Dr. Johnson, if we may judge by the following extract (Boswell's Life of Johnson, vol. 2, pp. 89-90): "The government of the schoolmaster is somewhat of the nature of a military government—that is to say, it must be arbitrary; it must be exercised by the will of one man according to particular circumstances. A schoolmaster has a prescriptive right to beat; and an action of assault and battery cannot be admitted against him unless there be some great excess, some barbarity. In our schools in England many boys have been maimed, yet I never heard of an action against a schoolmaster on that account." That is not the accepted doctrine of the present age, nor is it the doctrine of our Civil Code (Art. 245). The recent case, in Montreal, of *Lefebvre v. Congrégation des Petits Frères* (M.L.R., 6 S.C. 430) is an illustration. It was therein held by Davidson J., that a schoolmaster is not justified in seizing and holding a child of tender years by the ear, in order to compel him to kneel down, notwithstanding his efforts to free himself. All punishments are prohibited which may result in serious or permanent injury to the pupil. As Dr. Wharton, in his work on Criminal Law, puts it: "The law confides to schoolmasters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them respon-

sible unless the punishment be such as naturally to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions." In another recent case, *Boyd v. State*, before the Supreme Court of Alabama, 7 So. Rep. 268, a similar principle was enunciated by the Court. In this case, in which a schoolmaster was tried for assault and battery committed upon a pupil of 18 years of age, the evidence showed that after a severe chastisement inflicted in the school-room, the defendant followed the pupil into the school-yard, and struck him with a stick, and then "put his hands in his pocket as if to draw a knife;" that he "afterwards struck him in the face three licks with his fist, and hit him several licks over the head with the butt end of the switch." From these blows the eye of the boy was considerably swollen, and was closed for several days. The defendant was apparently very angry all the time, and very much excited; and after he got through with the whipping, he remarked, in an angry tone, in the presence of all the pupils and others, that he "could beat any man in China Grove beat." The Court held that there was ample room for the inference of legal malice, such as to justify a verdict of guilty.

EXCHEQUER COURT.

Nov. 4.

BURBIDGE, J.

THE SAINT CATHARINES MILLING AND LUMBER COMPANY, et al., Suppliants, v. THE QUEEN, Respondent.

Dominion Lands—Permit to cut timber—Implied warranty of title—Breach of contract to issue license.

1. A permit issued under the authority of the Minister of the Interior, under which the purchaser has the right within a year to cut from the Crown domain a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty.

2. The Government of Canada by order-in-council authorized the issue of the usual license to the company (suppliants) to cut timber upon the Crown domain, upon certain conditions therein mentioned. The company did not comply with these conditions, but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the Government of Ontario against the company, under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the Court of last resort.

Held:—That there was a failure of consideration which entitled the company to recover the ground rent paid in advance on the Government's promise to issue such license.

Querre:—Will an action by petition, or on reference, lie in the Exchequer Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels?

Nov. 17.

Present: BURBIDGE, J.

THE VACUUM OIL COMPANY, Suppliants, and THE QUEEN, Defendant.

Customs duties—"The Customs Act, 1883," secs. 68, 69, 198, 207—Money deposited in lieu of seizure—Market value—Waiver of notice of claim—Penalties—Prescription.

The company (suppliants) were manufacturers of oils, doing business at Rochester, New York. Their principal business in the United States was done directly with the consumer. For several years they did business from their office at Rochester directly with Canadian consumers. In some cases the purchaser paid the duty, and in others the company sold at a price including the duty and the cost of transportation. In the former case they charged the Canadian purchaser the price to consumers at their place of business in Rochester, and the oils were so invoiced and the duty paid on that value by the purchaser. In the latter case the price to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods

were entered for duty at a lower value,—two sets of invoices being used, one for the purchaser in Canada, and the other for the company's broker at the port of entry.

Held.—That the oils were undervalued.

2. The company, having changed their manner of doing business in Canada, and having established a warehouse at Montreal, which became the centre and distributing point of their Canadian business, exported oils from Rochester to Montreal in wholesale lots. The invoices showed a price which was not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States.

Held.—That there was no undervaluation.

3. When goods are procured by purchase in the ordinary course of business and not under any exceptional circumstances, an invoice disclosing truly the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the market value thereof. It is presumed that he buys at the ordinary market value.

4. It is not the value at the manufactory, or the place of production, but the value in the principal markets of the country, i.e., the price there paid by consumers or dealers to dealers that should govern. Such value for duty must be ascertained by reference to the fair market value of such or like goods when sold in like quantity or condition for home consumption in the principal markets of the country whence so imported.

5. Goods seized for fraudulent undervaluation were released upon a deposit of money. The importer made no claim by notice in writing under the 198th section of "The Customs Act, 1883," but there was no question that he claimed the goods. Subsequently he submitted evidence to show there was no ground for the seizure, and the Minister, having considered such evidence, and having heard the parties, acquitted the importer of the charge of fraudulent undervaluation, but found there had been an undervaluation of these and other goods. No proceedings were

taken to condemn the goods within the three years mentioned in section 207 of "The Customs Act, 1883." On petition to recover the money deposit it was

Held.—That the Minister had waived the notice of claim required by section 198 of the said Act.

Quære.—Does section 198 apply to a case where money is deposited in lieu of goods seized?

6. The additional duty of 50 per cent. on the true duty, payable for undervaluation under sec. 102 of "The Customs Act of 1883," is a debt due to Her Majesty which is not barred by the three years prescription contained in sec. 207, but may be recovered at any time in a Court of competent jurisdiction.

Quære.—Is such additional duty a penalty?

CIRCUIT COURT.

MONTREAL, Oct. 15, 1890.

Coram OUMET, J.

PETIT v. THOMPSON, and THOMPSON, opposant.

Procedure—*Venditioni exponas*.

HELD.—That a copy of judgment or order attached to a writ of execution *fi. fa.* issued from the Circuit Court for the district of Montreal, and designated a writ of *venditioni exponas*, is not such a writ within the meaning of the C. C. P.

The opposant Thompson filed an opposition to a pretended writ of *venditioni exponas* such as was issued from the Circuit Court, district of Montreal, on an order from Charland, J., alleging that the so-called writ was not a writ of *venditioni exponas* within the meaning of the law, and that the procedure was wholly irregular.

W. S. Walker, for opposant, cited Arts. 545, 662, and 663, C. C. P.; Lush's Practice, p. 520; Badgley's Practice, pp. 255 and 256; Stephen's Com. vol. 3, p. 585; C. S. L. C., Cap. 83, Sec. 169; Bouvier's Law Dict., p. 641.

OUMET, J., was decidedly of the opinion that the present procedure of the Circuit Court of the district of Montreal, was objectionable and irregular, no matter what had been the custom in the past, and the writ of *venditioni exponas* which it had been the practice to issue by this Court, could not be looked upon or considered as such a writ within the

meaning of the law of this Province, and hence he would maintain the opposition with costs.

W. S. Walker, for opposant.

Chauvin & Chauvin, for plaintiff.

(w. s. w.)

SUPERIOR COURT—MONTREAL.*

Lease of house—Uninhabitable premises—Cancellation—Absence of protest—Mise en demeure—Want of diligence of lessor.

Held:—1. When leased premises are in such an unsanitary condition as to expose the lessee and his family to danger of disease, the lessee may abandon the premises without an antecedent judgment of the Court.

2. When a complaint about the unhealthy condition of the premises is well founded, it becomes a landlord's clear and immediate duty to relieve his tenant of danger to life and health, and he cannot shelter himself behind a demand for a sanitary inspector's report.

3. The landlord, before the institution of the action to resiliate the lease which was in notarial form, had been verbally notified of the highly unsanitary condition of the premises, and had received the sanitary inspector's written notice to put the premises in order, but refused to consent to a cancellation of the lease, and took no steps to repair the defective drains during the three months which intervened between the service of the writ and the trial of the case. **Held**, that under these circumstances the landlord could not complain of the absence of a notarial or other written protest putting him in default to repair the premises.—*Palmer v. Barrett*, Davidson, J., Oct. 13, 1890.

SCOTTISH LAW AND THE COLLEGE OF JUSTICE.

The distinctive architecture of Scotland, her municipal institutions, her methods and weapons of warfare, her trade and commerce, even her *cuisine*, are eloquent witnesses to the once paramount influence of France. But it was with the growth of Scots law that the ancient league played its strangest freaks. "When one dives," wrote Lord Kames (Es-

says I), "into the antiquities of this island, it will appear that we borrowed all our laws and customs from the English. No sooner is a statute enacted in England but upon the first opportunity it is introduced into Scotland, and accordingly our oldest statutes are mere copies of theirs. Let the Magna Charta be put into the hands of any Scotchman ignorant of its history, and he will have no doubt that he is reading a collection of Scots statutes and regulations." The influence of France interrupted this original concord, and made the basis of Scots law Roman instead of English. It gave to our northern neighbour that peculiar legal terminology which is so perplexing to English ears,¹ and moulded the Scottish judicature after the image of French judicial institutions. The "Dean of Guild" is the "Consul des marchands;" the "Lord Advocate," the "advocates-depute," and the "procurators-fiscal" are "ministères publiques;" while the Court of Session—called in relation to its members the "College of Justice"—is a reproduction in miniature of the Parliament of Paris.

Before we proceed to describe the present constitution of the College of Justice as a convenient preface to a series of short sketches of the lives of its principal members, we may profitably pause to notice the chief points of historical resemblance between the Scotch tribunal and its French original. Each was a committee of the legislative body, at first occasionally, then periodically, appointed to try certain civil cases, or report on matters of sanitary or municipal interest. In each, the former functions superseded the latter. The reporting ceased; the absolute exercise of the delegated powers continued. In each, the committee became permanent, while the assembly which had created it passed away. It was a repetition of the episode of the Comitia Tributa and the Quæstiones Per-

¹ The following Scots law terms are of French origin: A bankrupt is "dyvour" (devoir); a barrister is an "advocate" (avocat); the solicitor becomes a "procurator" (procureur); a *feme sole* is "aneabil" (old French, anable); a judge arbiter is an "ansars" (anseors); to exonerate a defendant is to "assoilzie" him (absollir); to attach for debt is to "compryse" (comprendre); the right to decline trial by a particular judge is "declinature" (déclinatoire); to bribe is to "creish" (graisser—i.e. oindre la palme).

* To appear in Montreal Law Reports, 6 S. C.

petuæ (Journ. of Jurisp. vol. 30, p. 637). Although the name "College of Justice" would seem to be of Papal origin, its constitution, powers, privileges, and procedure were borrowed from France. Each of the Courts under consideration had a "president," a "dean" (dean of faculty—*doyen des avocats*), a "chancellor," "extraordinary lords" (French *pairs*), who were subjected to no test of qualification, "advocates" and "procurators." Each was stationary (*sédentaire*). In each, the judges were originally chosen in equal numbers from the spiritual and temporal sides. In each, candidates for judicial office were subjected to examination. The Scottish *Act of Sederunt* can hardly be better defined than in the words in which Meyer (*Institt. Judic.* II. c. 10) describes its French counterpart: "La faculté de disposer par arrêt non-seulement sur les causes et les intérêts particuliers portés à leur connaissance, mais aussi par voie de règlement pour tous les cas à venir." A senator of the College of Justice, like a judge in the Parliament of Paris, enjoyed the title of noble (*le titre de noble*), but in each case the nobility was personal and not hereditary. The Scottish, like the Parisian, judge, was exempt from certain taxes and from liability to discharge certain public duties. "On the institution of the College of Justice," says Stair (ii. 3, 63; iv. 1, 31), "appeals ceased." The decrees of the Parliament of Paris likewise were final (Bernardi, "Hist. de Legis. Franc.," 343). A minor analogy may be noted in the exclusion of the public from the proceedings of both tribunals. Finally, the Scotch, like the French, pleading consisted of five, and the same five, parts—viz. a preface, a narration of facts, a disposition of the pleader's and a confutation of his adversary's arguments, and a conclusion (cf. Sir George Mackenzie's "Idea of the Modern Eloquence of the Bar," pp. 28 and 43).

The external facts in the history of the College of Justice may now be briefly stated. Modelled by James V. after the Parliament of Paris, it was formally recognized in an Act of 1537 (c. 36). Its judges, who are called senators, were at first fifteen in number. The statute 11 Geo. IV. and 1 Wm. IV. c. 69, a.

20, reduced them to thirteen. The Court of Session, as at present constituted, consists of two chambers, the Inner and the Outer House. The former is subdivided into the "First Division" and the "Second Division," which exercise a concurrent appellate jurisdiction over the Outer House. The latter contains five Courts, each of which is presided over by a "Lord Ordinary." The remaining judges are divided between the two Courts in the Inner House. At the head of the First Division is the "Lord President," who is also styled the "Lord Justice General" in his capacity of chief member of the supreme criminal Court—"The Court of Justiciary." The *preses* of the Second Division is the "Lord Justice-Clerk."

The traditions of the College of Justice contain much that is ludicrous, and not a little that is brutal and shameful. It may be interesting to record a few incidents in the old judicial life of Scotland. Lord Eskgrove—a weak judge who flourished in the end of last century—was condemning a tailor to death for having murdered a soldier by stabbing him. His lordship thus summed up the aggravating circumstances: "And not only did you murder him, whereby he was bereaved of his life, but you did thrust or push or pierce or project or propell the lethal weapon through the belt of his regimental breeches, which were His Majesty's!" The same absurd person, before administering the oath upon one occasion to a lady who had come into Court to give evidence, deeply veiled, addressed her in the following terms: "Young woman! You will now consider yourself as in the presence of Almighty God and of this High Court. Lift up your veil, throw off all modesty, and look me in the face." One can pardon, however, the follies of Eskgrove, who was a mere "head without a name," and even the savagery of Braxfield—an eighteenth-century Jefferies—who is reported to have said with reference to the notorious prosecutions for sedition: "Let them bring me prisoners, and I'll find them law." But the student of early jurisprudence will read with surprise and regret the following anecdote about Lord Kames. At the Ayr Assizes in September, 1780, his lordship tried

for murder a man named Matthew Hay, with whom he had been in the habit of playing chess. The jury brought in a verdict of guilty. "That's checkmate to you, Matthew!" exclaimed the judge.—*Law Journal* (London).

DIVORCE IN CHINA.

The writer of the series of essays in the *North China Herald* on "The Natural History of the Chinese Girl" has some interesting observations on divorce in China, and its consequences to the wife. Chinese law, he says, recognizes seven grounds for the divorce of a wife—childlessness, wanton conduct, neglect of husband's parents, loquacity, thievishness, jealousy, malignant disease. The requisites for a Chinese wife are by no means sure to be exacting. A man in the writer's employ, who was thinking of giving up his single life, on being questioned as to what sort of a wife he preferred, compendiously replied, "It is enough if she is neither bald nor idiotic." In a country where the avowed end of marriage is to raise up a posterity to burn incense at the ancestral graves, it is not strange that childlessness should rank first among the grounds for divorce. It would be an error, however, to infer that these are ordinary occasions of divorce, simply because they are designated in the Imperial code of laws. It is always difficult to arrive at just conclusions in regard to facts of a high degree of complexity, especially in regard to the Chinese. But the truth appears to be that divorce in China is by no means so common as might be expected by one reasoning from the law. Probably the most common cause is adultery, for the reason that this is the crime most fatal to the existence of the family. But in every case of divorce there is a factor to be taken into account, which the law does not consider. This is the family of the woman, and it is a factor of great importance. It is very certain that the family of the woman will resist any divorce which they consider to be unjust or disgraceful, not merely on account of the loss of dignity, but for another reason even more powerful. In China a woman cannot return to her parents' house after an unhappy marriage, as is so often done in Western lands, because there

is no provision for her support. The land is set apart for the maintenance of the parents, and after that has been provided for, the remainder is divided among the brothers. No portion falls to a sister. It is this which makes it imperative that every woman should be married, that she may have some visible means of support. After her parents are dead, her brothers, or more certainly her brothers' wives, would drive her from the premises, as an alien who had no business to depend upon their family when she belongs to another. Under this state of things it is not very likely that a husband would be allowed to divorce his wife except for a valid cause, unless there should be some opportunity for her to "take a step"—that is, to remarry elsewhere. Next to adultery, the most common cause of Chinese divorce is thought to be what Western laws euphemistically term incompatibility, by which is meant, in this case, such constant domestic brawls as to make life, even for a Chinese, not worth living. When things have reached this pitch they must be very bad indeed. Every one of the above-mentioned causes for divorce evidently affords room for the loosest construction of the facts, and if the law were left to its own execution, with no restraint from the wife's family, the grossest injustice might be constantly committed. As it is, whatever settlement is arrived at in any particular case must be the result of a compromise, in which the friends of the weaker party take care to see that their rights are considered.

Law Journal (London).

RETIREMENT OF LORD JUSTICE COTTON.

On November 11, before the Master of the Rolls and Lords Justices Lindley, Bowen, Fry, and Lopes, the retirement of Lord Justice Cotton from the bench having been formally announced, his colleagues in the Court of Appeal took the opportunity of publicly expressing their esteem and affection for him.

The Attorney-General and a considerable number of Queen's counsel and members of the junior bar were present.

The Master of the Rolls addressed the bar as follows: The words which I am about to

address to you are the considered words of every member of the Court of Appeal. They will thus have the greater weight. We have come, into this Court, where Lord Justice Cotton so long presided, in order to make known to you all our deep sorrow at the greatest loss which could have happened to the Court of Appeal. Lord Justice Cotton has been obliged through ill-health to resign his high office, and his resignation has been accepted. His health broke down entirely from the strain put upon him by his assiduous, unswerving attention to his judicial duties. Lord Justice Cotton came to this Court straight from the bar. He was the undisputed leader, in fact, of the Chancery bar. We soon found that his knowledge of equity law was almost absolutely complete. Its principles, its practice, its details, its decisions, its application he had always ready. His powers of exposition and explanation were lucid in the highest degree. What invaluable assistance such powers gave to us, his colleagues, none of you can fail to appreciate. As a great lawyer, his predominant virtue was accuracy. As a judge, his appreciation of law and facts was instantaneous, yet his theory, often pressed upon us, or some of us, always practised by himself, was that all counsel should be heard to the fullest limit of what they desired to say, not only to the extent of the Court being certain that it had heard all that could reasonably be urged, but so that the parties might be satisfied that all had been said to the Court which they desired should be brought to its attention. As a great judge, patience and justice were his predominant virtues. His knowledge, quickness, lucidity, and inexhaustible patience made him as great and just a judge as ever adorned the bench. I must point out something more. He came into this Court when the joint administration of the two systems of law and equity was still unformed. Two sets of judges of equal talent, equal independence, equal conviction, and equal pride were to be brought, if possible, without either side yielding to the other, to look at each of the systems with the same eyes. This could only really be brought about if each set, as to its own former system, would learn to regard it, not

only as it had seemed to its practitioners before that it should be regarded, but also as it was regarded by the new minds now brought to bear more particularly upon it. The new point of view, the joint point of view, brought about by the fair contact of the two sets of minds, might be different from, but better than, either of the former and narrower points of view. Two remarkable equity judges—Lord Justice James and the late Master of the Rolls—had approved and acted upon this view. From the moment that Lord Justice Cotton found that all the members of the Court of Appeal were intent, not upon encroachment, not upon the alteration of either law, but only on the discovery of a joint appreciation of each, he adopted that desire without reserve, assisted its attainment by his unrivalled skill, and has helped us almost, if not quite, to realise it. In all ways we acknowledge with gratitude his superiority and his invaluable aid. We are here to testify our esteem and our affection, and, as I said at the beginning, our sorrowful sense that the Court of Appeal has suffered the greatest loss which could have happened to it.

The Attorney-General (Sir R. Webster, Q. C.), on behalf of the bar, replied: My Lord,—Nothing that I can say can add to the value of the graceful testimony which your lordship has given to the loss sustained by this Court. The profession is grateful to your lordship for allowing them, through my voice, the opportunity of expressing, on behalf of the bar, the regret which they feel at the retirement of the lord justice, and their sense of the loss which they have sustained. My lord, as I have said already, I cannot worthily add anything to that extraordinary tribute. I respectfully adopt, so far as the profession of the bar is concerned, every word that has fallen from your lordship; and yet, my lord, it may not be unfitting that in a very few sentences I should explain to your lordship, and through you to Sir Henry Cotton, whom I can no more address in public, the feelings which strike us as members of the profession from which he has now retired. My lord, the career of Sir Henry Cotton is one which might be a study to every public-school man, to every

public-school boy, to every university man, and to every student at the bar. Coming to us as a Newcastle scholar at Eton, gaining at Christ Church, Oxford, all but the highest honors, he has added a name to the almost endless roll of great names of which the two ancient foundations of Oxford and Cambridge proudly boast, and to the bar he brought that extraordinary industry, that wonderful clearness of reasoning, which has already been referred to more appropriately by your lordship. My lord, his career at the bar, at which for thirty years he practised, is known to all who hear me, and, as your lordship has already said, those who remember him there, and particularly who remember him as almost the leader, if not the leader, of the bar in the House of Lords and at the Privy Council, as well as in the Court of Chancery, will remember also the compliments worthily, deservedly, and frequently paid to the force of the arguments which he addressed to the Courts in which he was engaged. My lord, those who knew him felt then, as I feel now, that a more honorable advocate has never adorned the English bar. Then, my lord, upon the bench, called, as your lordship has said, at once from the bar to the position of a Lord Justice of Appeal, he, in that new field, fulfilled the expectations formed from his previous career. It strikes us—as it always struck us—that he was, as a lawyer, learned, clear, and accurate; as a judge patient and courteous; and as a man, considerate and forbearing. Your lordship, indeed, knows the strength which has been given to this division (if I may use the expression) of the Court of Appeal, since it has had the good fortune to have as its president Lord Justice Cotton. I should like to say one word, founded on intimate knowledge shared by bench and bar, that there was no member of our profession who more kindly guarded its best interests, or strove more earnestly to make it present to the young student every possible advantage so as to lead him to become a sound and skilful member of it. As I cannot speak to him again in public, I hope that some of your lordships may be able to convey to him in our own words this message of the bar, ex-

pressing our deep regret at his retirement, our appreciation of the loss which the bench has sustained by his withdrawal from it, and conveying to him for us this genuine expression of our earnest affection and esteem.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Nov. 22.

Judicial Abandonments.

Edmond Beaudry & Fils, traders Weedon, Nov. 17.
 Napoléon Desjardins, baker, Malbaie, Nov. 14.
 Dumas & Lortie, traders, Hébertville, Nov. 17.
 Zotique Garneau, trader, Quebec, Nov. 17.
 Adèle Hardy, widow of Denis Tardif, trader, Quebec, doing business as A. Tardif & Cie., Nov. 14.

Curatres Appointed.

Re Georges Amireau, farmer and trader, parish of l'Épiphanie.—J. S. Rivest, N.P., L'Assomption, curator, Nov. 10.
Re Beliveau & Archambault, importers, Montreal.—David Seath, Montreal, curator, Nov. 13.
Re Thos. Corrigan, Montebello.—Kent & Turcotte, Montreal, joint curator, Nov. 15.
Re Louis Deschêne, trader, Rivière Ouelle.—P. Langlais, N.P., Fraserville, curator, Nov. 17.
Re Henriette Dompierre.—W. A. Caldwell, Montreal, curator, Nov. 15.
Re Elzéar Fortier.—C. Desmarteau, Montreal, curator, Nov. 15.
Re Evariste Gélinais.—C. Desmarteau, Montreal, curator, Nov. 18.
Re Moïse Lapointe.—C. Desmarteau, Montreal, curator, Nov. 15.
Re Telephore Monpas, St. Pierre les Becquets.—Kent & Turcotte, Montreal, joint curator, Nov. 13.
Re A. J. Morissette.—Bilodeau & Renaud, Montreal, joint curator, Nov. 17.
Re Charles Ouellette.—Bilodeau & Renaud, Montreal, joint curator, Nov. 15.
Re J. W. Richards, Montreal.—Kent & Turcotte, Montreal, joint curator, Nov. 18.
Re J. B. A. Trudel & Co., Montreal.—J. McD. Hains, Montreal, curator, Nov. 18.
Re J. E. Turgeon.—A. Quessel, Arthabaskaville, curator, Nov. 14.

Dividends.

Re Etienne Beauchemin, trader, St. Monique.—First dividend, payable Dec. 10, C. Milot, St. Monique, curator.
Re A. Beauvais, Montreal.—First and final dividend, payable Dec. 15, Kent & Turcotte, Montreal, joint curator.
Re F. X. Billy, Victoriaville.—First and final dividend, payable Dec. 15, Kent & Turcotte, Montreal, joint curator.
Re Honoré Carrier, trader, Lévis.—First and final dividend, payable Dec. 9, G. E. Roy, Lévis, curator.
Re Jos Désaulniers.—Dividend, payable Dec. 8, F. Valentine, Three Rivers, curator.
Re Catherine Dagenais, Rolland & Co.—First and final dividend, payable Dec. 10, C. Desmarteau, Montreal, curator.
Re E. Donahue & Co., Farnham.—First and final dividend, payable Dec. 9, A. W. Stevenson, Montreal, curator.
Re Joseph Landsberg, Sherbrooke.—First dividend, payable Dec. 10, Kent & Turcotte, Montreal, joint curator.
Re Pierre Plourde, Fraserville.—First and final dividend, payable Dec. 10, P. Langlais, Fraserville, curator.

Separation as to Property.

Entitienne Champagne vs. Victor Trudel, farmer and trader, parish of St. Guillaume d'Upton, Nov. 3.
 Rosalie Matteau vs. Edouard Larochelle, trader, parish of St. Nérée, county of Bellechasse, Nov. 18.

The Legal News.

VOL. XIII. DECEMBER 6, 1890. No. 49.

Appeals to the Supreme Court are being prosecuted with considerable activity at present. The last list comprised sixteen Quebec appeals, nearly every case in which the amount was large enough to give jurisdiction being inscribed. The list indicates a singular disparity between the business of the Quebec and Montreal divisions—one only appeal coming from the former, while fifteen appeals are from the latter. There were twenty-two cases from Ontario, eleven from the Maritime Provinces, and two Exchequer appeals.

An interesting question of *res adjudicata* was decided in a recent case of *Macdougall v. Knight* by the English Court of appeal. The action was for libel in respect of a certain pamphlet. The plaintiff had brought a previous action, which was dismissed, founded on other passages in the same pamphlet. The Court refused to allow the plaintiff to proceed with the second action, holding that the matter was *res judicata*, and that the new action was an abuse of the process of the Court.

The vacancy in the English Court of Appella caused by the retirement of Lord Justice Cotton has been filled by the appointment of Mr. Justice Kay, a judge of the Chancery Division. Robert Romer, Q.C., has been appointed a judge of the Chancery Division to replace Mr. Justice Kay.

A writer in the *London Law Journal*, referring to the subject of the capacity of the wife as a witness, gives some interesting facts showing the result of piecemeal legislation. "Here (he says) old legal fictions, resulting in curious limitations, are found to be in conflict with more modern views. It is still the existing rule that a wife may not give evidence against her husband in criminal cases except in proceedings under the Ex-

plosive Substances Act of 1883. But in a civil action the testimony of a wife can be received either for or against her husband. In this difference between the rules of evidence in criminal and civil trials there exists an example of the antagonism of the old rules of the Common Law with modern principles. Of course the inability of the wife to give evidence against her husband is a necessary consequence of the legal fiction that the legal existence of the wife was merged in that of the husband. Though based on this fiction, it has been strengthened by the idea that wives would be biassed in favor of their husbands, and that if they gave evidence it would, to use Coke's expression, be 'a cause of implacable discord and dissension.' This reason has certainly had much to do with the continuation of the rule, for it has a practical ring about it sufficient to enable many to believe in the value of the rule who would not be convinced by the common law theory. It has been repeated over and over again by judges and legal writers, but may always be traced back to Coke's dictum. Therefore, from the beginning of the reign of James I, a practical reason has been united with an old legal fiction which, without its more modern ally, would hardly have had strength to enable this particular rule to hold the field. It is interesting, before quitting this point, to notice shortly the progress of these changes. In 1846 the evidence of husbands and wives for or against each other was made admissible in actions in a county court. The curious aspect of this particular change is that the reform was introduced into the procedure of a class of law courts in which from the position of the litigants and from the general nature of the proceedings, there is more probability of false evidence being given than in the superior courts. But the rejection of such evidence would, in many instances, have greatly lessened the practical value of these tribunals. Three years later, a further inroad was made on the still existing rule, for in bankruptcy proceedings a wife was henceforth to be allowed to give evidence as to the bankrupt's affairs. She was, in fact, to be asked to give evidence which in many cases might be adverse to her husband's interests. But the Evidence

Acts of 1851 and 1853 finally broke down the old rule so far as civil proceedings were concerned, and in these cases husbands and wives could henceforth be called to give evidence for or against each other. The passing of these Acts was also the most practical refutation in the world of the arguments against the admission of what Bentham called 'family peace disturbing evidence.' As if to make the existing anomaly more ridiculous, the Married Women's Property Amendment Act, 1884, allows a husband or wife to give evidence against each other in proceedings under the principal Act,—that is to say in proceedings by a husband or wife against the other in respect of their separate property, whether civil or criminal; so that if a husband steals his wife's money which she has earned by her own exertions, she may appear at a police court and secure his conviction; but if the same person steals the cash-box from his neighbour's shop, the wife of the thief cannot be called as a witness, although out of her mouth his guilt may conclusively be proved.

COUR SUPÉRIEUR.

MALBAIE, 17 juillet 1890.

Coram GAGNÉ, J.

C. J. TREMBLAY v. LA CORPORATION DU VILLAGE DE LA POINTE-AU-PIC.

Mandamus—Règlement municipal prohibant la vente des liqueurs enivrantes—Certificats pour licence d'auberge.

Jugé:—10. *Que le tribunal peut intervenir par bref de mandamus, s'il y a abus dans l'exercice du pouvoir discrétionnaire laissé au conseil municipal sur demande pour confirmation de certificat, ou erreur par suite de fausse interprétation de la loi.*

20. *Que le requérant n'était pas tenu d'alléguer qu'il était dans l'intérêt public de confirmer son certificat.*

30. *Qu'un règlement prohibitif dont copie n'a pas été transmise au percepteur du revenu, aux termes de l'art. 562 C. M est sans effet.*

40. *Que le conseil est tenu de prendre en considération la demande de confirmation d'un certificat et d'exercer sa discrétion.*

En mars dernier, le conseil municipal de la défenderesse passa un règlement prohibant la vente des liqueurs enivrantes, mais omit d'en faire transmettre une copie au percepteur du revenu, avant le premier mai suivant.

Vu l'absence d'un règlement prohibitif en force, le requérant présenta au conseil un certificat pour licence d'auberge, dont il demanda la confirmation. Le conseil rejeta sa demande sans l'avoir examinée ni prise en considération. De là, requête pour bref de mandamus.

Jugement:—"La Cour adjugeant d'abord sur la défense en droit;

"Considérant qu le requérant ne demande pas que le conseil municipal du village de la Pointe-au-Pic, soit forcé de lui *accorder une licence* pour la vente des liqueurs enivrantes

"Que le requérant n'était pas obligé d'alléguer dans sa requête libellée, qu'il était dans l'intérêt public de confirmer son certificat;

"Que le dit requérant n'était pas tenu de payer une taxe de deux piastres, ni de revêtir de timbres pour ce montant, son certificat ou sa demande de confirmation, la loi n'exigeant cette formalité que dans les cités de Montréal et de Québec;

"Qu'en supposant qu'il serait laissé à la discrétion du conseil d'accorder ou refuser la confirmation d'un certificat, le tribunal ou le juge peut encore intervenir par bref de mandamus quand il y a abus dans l'exercice de ce pouvoir discrétionnaire ou erreur par suite d'une fausse interprétation de la loi;

"Que la requête libellée allègue que le certificat a été refusé sans raison valable, et sans qu'aucune des raisons prévues par la loi ait été invoqué, qu'il était en conséquence important de connaître les circonstances et les motifs de ce refus du conseil, que preuve avant faire droit a eu lieu du consentement des parties et par ordre du juge, qu'il a été établi que le conseil a refusé, sans raison valable, de prendre en considération le certificat soumis par le requérant, et que ce refus est illégal tel qu'expliqué plus au long ci-après;

"Renvoyons la dite défense en droit sans frais;

"Et adjugeant ensuite sur le mérite de la requête libellée;

"Considérant que d'après les documents produits le conseil municipal du village de la Pointe-au-Pic, a, sans aucune discussion, refusé irrévocablement de sanctionner et accorder le certificat demandé par le requérant, pour l'unique raison qu'il considérait le règlement qu'il avait passé pour prohiber la vente des liqueurs enivrantes comme étant le seul en force, pleine vigueur et actualité, et qu'il ne se croyait pas en droit, après consulte à cet effet, de pouvoir statuer le dit jour, contrairement aux allégués et restrictions du dit règlement ;

"Qu'il résulte des procédés du conseil qu'il n'a pas voulu prendre en considération ni examiner le dit certificat, ne se croyant pas en droit de statuer contrairement au dit règlement ;

"Que le dit règlement n'a pas été remis ou signifié au percepteur du revenu avant le premier mai dernier, et qu'il n'a jamais été en force ;

"Qu'il y a donc eu erreur dans la décision du dit conseil, et qu'il aurait dû procéder à prendre en considération la demande du requérant, sans s'occuper du dit règlement ;

"Qu'en supposant qu'il fût laissé à la discrétion du conseil d'accorder ou refuser la confirmation du dit certificat, le dit conseil était tenu de le prendre en considération et d'exercer sa discrétion ;

"Que par suite de l'erreur dans laquelle est tombé le dit conseil, et de la fausse appréciation qu'il a faite de la loi, relativement aux règlements prohibant la vente des liqueurs enivrantes, le dit requérant n'a pas eu l'avantage d'avoir une décision sur le mérite de sa demande ;

"Déclarons la requête libellée du dit requérant bien fondée, et ordonnons qu'il émane un bref péremptoire, enjoignant à la défenderesse de prendre en considération la demande du requérant pour la confirmation du certificat produit par lui, et de donner sa décision sur cette demande suivant la loi, et ce sous un délai de six jours, et à défaut par la dite défenderesse de se conformer au dit bref dans le susdit délai, elle est condamnée purement et simplement à payer au requérant, par voie d'amende, la somme de

\$500, le tout avec dépens distracts à MM. Angers et Martin, procureurs du requérant."

Angers & Martin pour le requérant.

J. S. Perrault, pour la défenderesse.

(G. A.)

APPEAL REGISTER—MONTREAL.

Saturday, November 15.

Desmarteau & Thompson.—Motion to dismiss appeal. Granted.

Vincent et al. & Poupart.—Motion for leave to appeal from an interlocutory judgment. Granted.

Thompson & Molson.—Heard. C. A. V.

Elliott & Simmons.—Part heard.

Monday, November 17.

Claude & Jasmin.—Motion for leave to plead *in formâ pauperis*; motion for new security, etc. C. A. V.

Elliott & Simmons.—Hearing concluded. C. A. V.

Daveluy & Société Canadienne-Française de Construction de Montréal.—Heard. C. A. V.

Hart & Joseph (two appeals).—Heard. C. A. V.

Tuesday, November 18.

Claude & Jasmin.—Motion for leave to plead *in formâ pauperis* granted. Motion for new security rejected without costs. Motion for more definite reasons of appeal rejected without costs.

Atlantic & N. W. R. Co. & Lavallée.—Heard. C. A. V.

DeLaet & Mallette.—Heard. C. A. V.

Gaudry & Gaudry.—Heard. C. A. V.

Corporation du Comté de Verchères & Corporation du Village de Varennes.—Heard. C. A. V.

Wednesday, November 19.

Barnard & Molson.—Motion for leave to appeal from interlocutory judgment. C. A. V.

The Queen v. Berthiaume.—Heard on reserved case. C. A. V.

Bruneau & Moreau.—Heard. C. A. V.

Lomer & City of Montreal.—The appellant files a discontinuance of the appeal, by and with the consent of respondent. Acte granted accordingly.

Ontario & Quebec R. Co. & Curé et Marguilliers de l'Œuvre et Fabrique de Ste-Anne de Bellevue.—Heard. C. A. V.

Thursday, November 20.

Inglis & Phillips.—Heard. C. A. V.

Durocher & Lacoste.—Heard. C. A. V.

Friday, November 21.

The Queen v. Berthiaume.—Conviction maintained.

Thomson & Dominion Salvage & Wrecking Co.; Brown & Do.—Part heard.

Lacroix & Fautoux.—Declared privileged.

Saturday, November 22.

Reburn & Ont. & Quebec R. Co.—Confirmed.

Benning & Rielle.—Confirmed.

Watts & Wells (two appeals).—Confirmed.

Lindsay & Chaplin.—Confirmed. Motion for appeal to Privy Council granted.

Poudrette Lavigne & Poudrette Lavigne.—Confirmed, Tessier J., *diss.* as to costs, being of opinion to confirm without costs.

Robillard & Dufaux.—Confirmed.

Lambe & Allan.—Confirmed. Tessier, J., *diss.*

Guevremont & Guevremont (two appeals).—Confirmed.

Rh  aume & Trudel.—Confirmed.

Ford & Whelan.—*D  sistement* from the appeal filed.

Lalonde & Rozon.—Reversed.

Reburn & O. & Q. R. Co.—Confirmed.

Benning & Atlantic & N. W. R. Co.—Confirmed.

DeLaet & Mallette.—Confirmed.

Thompson & Dominion Salvage & Wrecking Co.; Brown & Do.—Hearing resumed.

Monday, November 24.

Meunier & City of Montreal.—Motion for leave to appeal from interlocutory judgment. Rule nisi returnable first day of next term.

Ricard & City of Montreal; Renaud & City of Montreal; St-Pierre & City of Montreal.—Same entry in each case.

Benning & Atlantic & N. W. R. Co.—Motion for leave to appeal to Privy Council granted.

Watts & Wells (two cases).—Motion for leave to appeal to Privy Council granted.

Thompson & Dominion Salvage and Wrecking Co.; Brown & Do.—Hearing concluded. C. A. V.

Tuesday, November 25.

Elliott & Simmons.—Confirmed.

Hart & Joseph (two appeals).—Reversed.

Laflamme & St-Jacques.—Heard. C. A. V.

Lambert & Desaulniers.—Heard. C. A. V.

Merrill & Ryder.—Heard. C. A. V.

Wednesday, November 26.

Hall & Read.—Heard. C. A. V.

Johnson & Landry.—Heard. C. A. V.

West & Page.—Part heard.

Thursday, November 27.

Barnard & Molson.—Motion for leave to appeal granted; costs to follow suit.

Merchants Bank & Parker (two cases).—Confirmed.

Ontario Bank & Parker.—Confirmed.

Molsons Bank & Parker.—Confirmed.

Hill & Ferreri.—Re-hearing ordered.

Watson & Johnson.—Reversed, Tessier, J., *diss.*

Brock & Gourley.—Reversed.

Turnbull & Browne.—Judgment modified, each party paying his own costs in both courts; Tessier, J., *diss.*

Wells & Burroughs.—Reformed, Tessier, J., *diss.*

Vigeant & Poulin.—Reversed, without costs in either court.

Perrault & Montreal & Sorel R. Co.—Confirmed.

Hastie & Hastie.—Reformed, with costs; security for the whole amount of the condemnation; Tessier, J., *diss.* as to costs.

Dandurand & Mappin.—Confirmed.

Smith & Ives.—Appeal dismissed.

Montreal Union Abattoir Co. & City of Montreal.—Appeal dismissed.

West & Page.—Hearing concluded. C. A. V.

Mr. Justice Cimon, who has been appointed assistant judge of this Court, to replace Mr. Justice Tessier, appears.

And the Court is adjourned to Jan. 15, 1891.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

[Continued from p. 375.]

In the case of *Benham v. United States Guarantee and Life Assurance Co.*,¹ the assured had stated a check (by fortnightly examination of his accounts) on their secretary whose

¹ 14 Engl. Law & Eq. Rep., 1852-3, p. 534.

fideliſy the defendants had guaranteed. The court held that all the assured had done was to declare a course that he intended to pursue, and that it was not a warranty.

Suppose a ship insured for Rio Janeiro, and after the description is written "intended to touch at St. Thomas." Surely such a clause gives the assured liberty, but he does not thereby warrant to touch.¹

In a case of *Notman v. The Anchor Ins. Co.*,² a man's life was insured—he "about to proceed to Belize," and he paid an extra premium to cover twelve months' residence at Belize. He did not soon go to Belize—not for upwards of a year; afterwards he went to Belize, and before twelve months' residence there had expired, he died. Held, that he had not warranted to go to Belize at any fixed time, and that the company was liable.

§ 207. Burden of proof.

Where misrepresentation is alleged, the onus of proving it is on the insurers. They must prove the representation false, and false in a point material. The insurer is to have the benefit of doubts.

In a case of *Fowkes v. Manchester and London Life Assurance Association*,³ the Court of Queen's Bench held that a mis-statement did not vitiate the policy unless it was wilful.

§ 208. Materiality of representation is a question of fact.

Duer is of the opinion, and such is certainly the inference from the authorities cited below, that when the materiality does not "depend on the testimony of witnesses, but results as a necessary consequence, from the nature of the fact, or has been established by prior adjudications, it is the duty of the judge to give a positive instruction to the jury, and that their verdict in opposition to his charge would be set aside as contrary to law."

Thus, in regard to the insured's representation, that he is the owner of property, when he is not the actual and legal owner, but his interest is inchoate, equitable, qualified or

contingent, the Courts of New York and Massachusetts have decided that it is not material to the risk, while in the United States Courts, as well as in Tennessee and Illinois, directly the contrary is held, and in neither case was the question of materiality submitted to the jury.⁴ This would be so in Quebec Province. If the insured be proved not owner he cannot recover.

Bunyon, p. 78, says it is the duty of the judge to see that the jury are not misled by the evidence.

It is the practice of most offices to insert the statements or representations, made at the time of effecting the insurance, in the body of the policy. By this means they become a warranty, and preclude questions from arising upon the subject of the materiality or immateriality of the statements.

Representations in life insurance, observed Lord St. Leonards, in *Anderson v. Fitzgerald*,⁵ need not be material if false. It is sufficient to ask the jury, was the representation, or were the statements, false. Secondly, were they made in effecting or obtaining the policy?

The judges were asked:—Was it necessary for the insurance company to prove on the trial that the answers given by Fitzgerald to questions twenty-one and twenty-two were or was material, as well as false. All the judges answered: That it was not necessary.

Conditions often apply to material misrepresentations and go on (as in this case) that if any fraud shall have been practised, or any false statements made in or about obtaining the policy, the policy shall be null. (*Per* the eleven judges.)

The words of the assured in his answers are to be construed as the words of the assurers and most strongly against them if ambiguous. (*Per* the eleven judges.)

¹ *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Curry v. Commonwealth Ins. Co.*, id. 535; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. 417; *Ætna Ins. Co. v. Tyler*, 12 Wend. 507; *S. C.*, 16 id. 385; *Columbian Ins. Co. v. Lawrence*, 2 Peters 25; *S. C.*, 10 id. 507; *Carpenter v. Providence Washington Ins. Co.*, 16 Peters 495; *Brown v. Williams*, 15 Shepley, 252; *Illinois Mut. Fire Ins. Co. v. Marcellis Manufacturing Co.*, 1 Gilman 236.

² 4 House of Lords cases, English Jurist of 1858.

³ And so of Grant's warranty pretended.

See *Elliott v. Wilson*, 7 Brown's Cases in Parliament. Liberty to touch at Leith was held not a warranty to do so.

⁴ English Jurist, A. D. 1858, p. 714.

⁵ Q. B. England, A. D. 1863.

Representations here were embodied in the contract. (*Per* the Lord Chancellor.)

But Lord St. Leonards said the "word 'false' being used in connection with the 'earlier word 'fraud' means not that that 'is merely false, but false to the man's 'knowledge, fraudulently false, 'the untruth 'must be wilful.' The latter branch of the 'clause I would advise the company to put 'wilful into—'wilful' before 'false statement.'" Phillips approves, vol. I.

§ 209. What is a Warranty?

A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent, and as applicable to fire policies is usually of an affirmative nature, as that the property insured is of the nature described in the policy.

A warranty being in the nature of a condition precedent, it is quite immaterial for what purpose or with what view it is made; but being once inserted in the policy it becomes a binding condition on the insured; and unless he can show that it has been strictly fulfilled, he can derive no benefit from the policy.

But sometimes warranties need not be alleged as fulfilled, as if they be gathered by insurers from the description of the subject insured. In such case the insurer ought to allege the warranty, and breach of it.

The meaning of a warranty is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed.

An express warranty being in the nature of a condition precedent, it must appear on the face of the policy.

The stipulations and conditions printed upon the same sheet as the policy, and delivered with it, form a part of the policy, and are considered as express warranties.¹

Instructions in writing for effecting the policy, unless inserted in the instrument itself, do not amount to a warranty, but only to a representation.

§ 210. When representations become warranties.

A reference in the policy to the application, or to a plan on file in the office, for a further description of the subject insured will not constitute the statements therein made warranties.¹

But if the application is in terms made a part of the policy, or referred to as forming a part of the policy, or if the plan be attached to the policy and referred to in it as part of it, the statements of the insured, which would otherwise be merely representations, are thereby converted into warranties, and are binding upon him as such.²

The breach of warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the policy is void, and whether the thing warranted be material or not, whether the breach of it proceeded from fraud, negligence, misinformation, mistake of an agent, (unless the agent of the insurers,) or any other cause, the consequence is the same. With respect to the compliance with warranties, there is no latitude nor equity.

§ 211. Warranties affirmative or promissory.

Warranties in policies are of two kinds: Affirmative, affirming something, and promissory, something to be done or not to be done. Both are in the nature of conditions precedent.³

But, query, have they all the incidents; for instance, must all warranties be set out with allegations of compliance with them? or must the insurer set them out and defend himself by plea of breach of warranty? It depends: warranty from mere description, *semble*, need not be set out.

The law of the continent of Europe allows substantial compliance with warranty to be

¹ *Houghton v. Manufacturers' Ins. Co.*, 8 Met. 114; *De Longuemare v. Tradesmen's Ins. Co.*, 2 Hall 589; *Stobbing v. Globe Ins. Co.*, id. 633; *Jefferson Ins. Co. v. Cothrel*, 7 Wend. 72; *Farmers' Ins. Co. v. Snyder*, 13 id. 92; *S. C.*, 16 id. 481; *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188.

² *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Egan v. Mut. Ins. Co.*, of Albany, 5 Denio, 326; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Rarbour, 285; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comstock, 210.

³ *Goicoechea v. Louis. S. I Co.*, 3 Cond. R.La.

¹ *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488.

sufficient. In Louisiana it must be strictly performed.

If there be breach of a warranty, though that may not have led to the loss, the insurers are discharged. And so in case of marine insurance in condemnation cases. (Ib.)

Insurance was effected upon a distillery which it was agreed should be suspended in six weeks. It was used ten weeks. A fire occurred in the twelfth week. The action by the insured was held to be not maintainable; he had violated the contract. And this applies to buildings and merchandise.¹

The rule, which prevails upon sales of property, that a warranty does not extend to defects which are known to the purchaser, does not apply to warranties contained in contracts of insurance.²

The only question is whether the thing warranted has taken place, or be true or not? If not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty.³

Twelve pails full of water were agreed to be kept on each flat of a building. The fact of their not being kept was held fatal; though had they been, it could not have prevented the fire.⁴ The above is the promissory warranty of the authors.

§ 212. Papers attached to or folded up in policy.

Where a slip of paper describing the state of a ship, the particulars of the voyage, etc., was wafered to a policy at the time of subscribing, Lord Mansfield held that this was not a warranty, nor to be considered part of the Policy, but only a representation. *Bize v. Fletcher*.⁵ But the circumstances of the case must be looked at. If "conditions of insur-

ance" be wafered to a policy they may make warranties.

In *Bize v. Fletcher*, how was it? Lord Mansfield did hold it a written representation binding on the insured. That is all that it was pretended by insurers to be. They held that by it the voyage of the ship insured was restricted, but restriction such as alleged to be was not found to be derivable from the slip of paper, and the policy was clearly protective of the amplest voyage. Where evidence was offered to prove that a written memorandum enclosed in the policy was always among merchants considered as a part of the policy, Lord Mansfield held, that whether this was or was not a part of the policy, was a question of law, and therefore that such evidence could not be received, and that a written paper, by being folded up in the policy, did not become a warranty.¹

But it is sufficient that the warranty appear upon the face of the policy, although not written in the body of it. If it be written in the margin, either in the usual way, or transversely, it being part of the written contract when signed, it will be a good warranty.

Any paper or application referred to in the policy is a warranty by the Royal Insurance Company conditions.

GENERAL NOTES.

OATHS IN INDIAN COURTS.—The Advocate-General of Bengal, in addressing the High Court recently on the subject of Mohammedan oaths, in the old Supreme Court of Calcutta, said that the Moslem interpreter employed in administering oaths to witnesses made a good deal of money by means of a private understanding with the witness as to the mode of adjuring him. The form binding on the Mohammedan conscience is to make the Koran rest on the head while the oath is administered. But if the Koran is skilfully held just above the head, so as not to be in actual contact with it, the form is not valid and the oath not binding. Many witnesses were thus enabled, through the aid of the interpreter, to lie without perjury. In an insolvency case, in which a Jew sought the benefit of the Act, a well-known barrister represented an opposing creditor. His instruction had been to question the applicant in regard to certain matters in which his answers, if affirmative, would disclose valid ground for refusing the application. To the surprise of counsel the Jew denied everything, and it seemed as if his instructions were not correct. At this juncture it was

¹ Cassation, 5 Feby., 1858; Sirey, A.D. 1858, 1, p. 471.

² *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barbour, 285; *Vandevoort v. Columbian Ins. Co.*, 2 Caines, 155; *Cheriot v. Barker*, 2 Johns. 346; *Higginson v. Dall*, 13 Mass. 96.

³ *Fowler v. Aetna Fire Ins. Co.*, 6 Cowen, 673; *S. C.*, 7 Wend. 270; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; *Farmers' Ins. Co. v. Snyder*, 16 Wend. 481; *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188; *Gates v. Madison Co. Mut. Ins. Co.*, 2 Comstock, 44.

⁴ *Garrett v. Provincial Ins. Co.*, 20 U.C.Q.B. Rep. 201.

⁵ 1 Dougl.

¹ Dougl, 12.

suggested that the Jew be required to swear on the life of his son. The advocate put this unusual suggestion to the presiding judge (Sir J. Colville), who adopted it, and the Jew was adjured accordingly. The same questions were again put to him, but this time they elicited affirmative replies, and counsel's object was accomplished.

THE NEWSPAPERS OF THE WORLD.—The number of newspapers published in all countries is estimated at 41,000; 24,000 appearing in Europe. Germany heads the list with 5,500, then comes France with 4,100, England with 4,000, Austria-Hungary with 3,500, Italy with 1,400, Spain with 850, Russia with 800, Switzerland with 450, Belgium and Holland with 300 each, and the rest is published in Portugal, the Scandinavian and the Balkan countries. The United States have 12,500 newspapers, Canada has 700, and Australia also 700. Of 300 journals published in Asia, Japan alone has 200. Two hundred journals appear in Africa, and three in the Sandwich Islands. In the principal languages there are published 17,000 newspapers in English, 7,500 in German, 6,800 in French, 1,800 in Spanish, and 1,500 in Italian.

STOPPING AN EXPRESS TRAIN.—The charge against Mr. Fountaine, of Norfolk Hall, justice of the peace, deputy-lieutenant of Norfolk, and master of the West Norfolk Foxhounds, of stopping a Great Eastern express train on March 18, was heard at Swaffham Quarter Sessions on July 9. The station-master at Eastwinch having declined to stop the train, the defendant went into the four-foot way, threw up his arms, and caused the driver to draw up. He then entered and proceeded on his journey. Letters from the company had been ignored. Defendant now pleaded guilty, and after a long address from the chairman, Lord Walsingham, he was fined £25, and bound over in the sum of £100 to keep the peace for six months.

LIBELLING JUDGES.—Thomas Beardmore, who has been residing in Duke street, Southport, but who was formerly a farmer at Hipstone, in Staffordshire, was charged in the Police Court on July 11th, with sending cards through the post containing offensive writing. Some time ago the defendant was a litigant before Judge Jordan and lost his case. He afterwards commenced writing libellous postcards, and for a libel on Judge Jordan he was sentenced to six weeks' imprisonment and a fine of £20 for contempt of Court. Not paying the fine, he suffered a further imprisonment of seven months, and subsequently he commenced sending postcards to all connected with his trial, from the Lord Chancellor downwards. He was now fined 40s. and costs in three cases, or a month's imprisonment for each.

PROLONGED SITTINGS.—Some extraordinary judicial doings are reported from Queensland, Australia. The presiding judge was in a hurry to get away, and tried cases continuously for thirty-six hours. At one stage all the available jurors were occupied in considering verdicts, and, not to lose time, the judge ordered the doors of the court room to be locked, and then impounded every person in the audience qualified to serve. Many of the jurors were so exhausted by continuous service that they fell asleep in their seats, but the trials went on.

INSOLVENT NOTICES. ETC.

Quebec Official Gazette, Nov. 29.

Judicial Abandonments.

John E. Bradford, trader, Lachute, Nov. 26.
Gendron & Gauthier, traders, village of Megantic, Nov. 25.

Curators appointed.

Re Ulric Baril, Gentilly.—Bilodeau & Renaud, Montreal, joint curator, Nov. 23.
Re M. J. Dayet & Co., wine merchants, Quebec.—N. Matte, Quebec, provisional guardian, Nov. 20.
Re Alphonse Durand, contractor.—D. Guilbault and P. E. McConville, Joliette, joint curator, Nov. 17.
Re Kenniburgh & Boyce, traders, Lachute.—G. J. Walker and W. J. Simpson, Lachute, joint curator, Nov. 20.
Re Placide Larochelle.—F. A. Mercier, St. Michel de Bellechasse, curator, Nov. 23.
Re J. H. Marcoux & Co., Montreal.—Kent & Turcotte, Montreal, joint curator, Nov. 24.
Re George Rhéaume.—Pierre F. Renault, parish of St. Francis, curator, Nov. 19.

Dividends.

Re Bénoni Beaudin.—First and final dividend, payable Nov. 16, O. Desmarreau, Montreal, curator.
Re Gilbert Currie Campbell.—Dividend, H. Hartland, Ormstown, curator.
Re Mary Bélanger, wife of Joseph Labelle.—First and final dividend, payable Dec. 10, A. F. Gervais, St. John, curator.
Re Henriette Dompierre.—First and final dividend, payable Dec. 16, W. A. Caldwell, Montreal, curator.
Re Wilfred Doré, grocer, Quebec.—First and final dividend payable Dec. 15, H. A. Bédard, Quebec, curator.
Re Joseph N. Massicotte.—Dividend, E. Audette, Farnham, curator.
Re Amable D. Porcheron.—First and final dividend, payable Dec. 17, Millier & Griffith, Sherbrooke, joint curator.
Re L. L. Raymond, L'Ange Gardien.—Second and final dividend, payable Dec. 18, A. W. Wilks, Montreal, curator.
Re A. F. Weippert & Co., grocers.—First and final dividend, payable Dec. 15, H. A. Bédard, Quebec, curator.

Separation as to property.

Zoé Benoit vs. Dominique Desautels, Jr., farmer, parish of St. Pie, Nov. 24.
Julie Boulais vs. Jean Bte. Barré, farmer, Ste Marie de Monnoir, Nov. 8.
Sophranie Lemire dit Marsolais vs. Isate Forget dit Dépatie, contractor, Nov. 22.
Almaïde Tétréault vs. Sergius Archambault, trader, Ste. Théodose, Nov. 17.

The Legal News.

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REMINISCENCES OF THE FRENCH BAR.

In 1839, there was published an extremely amusing and interesting book, entitled "*Souvenirs de M. Berryer, Doyen des Avocats de Paris de 1774 à 1838.*" The author, M. Berryer, the father of the celebrated orator of that name, entered the profession of the law in 1774, and continued in active practice upwards of sixty years.

He was the first advocate who condescended to plead before the revolutionary tribunals, and he was concerned more or less in almost all the causes of consequence which came before them. His reminiscences consequently comprise the ancient *régime*, the transition period, and the established order of things; and they are narrated fully and frankly, in clear, easy, familiar language, with some of the caution taught by experience, but with none of the garrulity of age. They have, moreover, a merit which few French contemporary memoirs possess,—that of authenticity.

M. Berryer begins his work by describing the courts of law as they existed when he first entered on his novitiate. At the head stood the Parliament of Paris,—an august and erudite body, justly venerated for the fearlessness with which, on many trying occasions, they had refused to register the arbitrary edicts of the Crown. This body was divided into chambers, which held their sittings in the Palais de Justice,—a building which rivalled Westminster Hall in the richness and variety of its associations, though far inferior in architectural magnificence. Around the Parliament of Paris were clustered a number of inferior jurisdictions, closely resembling those of which the ancient judicial system of England, and indeed of every country with feudal institutions, was made up. There existed provincial parliaments and other local tribunals, it is true,—for the administration of justice in France

was never centralized; but, what with appellate and exceptional jurisdiction, the concourse of suitors to the capital was immense. A countryman inquired of a lawyer whom he saw about to ascend the grand staircase of the Palais de Justice with his bag of papers, what that great building was for. He was told it was a mill. "So I see now," was the reply; "and I might have guessed as much from the asses loaded with bags."

It is a remarkable circumstance, that a great majority of the public buildings of London are of comparatively recent date, those which they replaced having been destroyed by fire. The same fate has befallen the public buildings of Paris; and M. Berryer states that the immense vaulted galleries which, from the shops established in them, had procured the Temple of Justice the name of the Palais Marchand, were swept away by a conflagration in 1774.

He also duly commemorates the Grand Châtelet, the seat of sundry metropolitan jurisdictions, and relates some curious circumstances regarding the ancient debtors prisons,—the Fort-l'Évêque and the Conciergerie.

In the former was confined no less a person than Maximilian, the reigning Duke of Deux Ponts, afterwards King of Bavaria. In the latter, M. Berryer tells us, a rich Englishman, Lord Mazareen, was detained during many years for a large sum due on bills of exchange, which, though possessed of ample means, he obstinately refused to pay, on the ground of his having been cheated out of them at play. He lived at the rate of more than a hundred thousand francs a year, kept open table, and had his servants and carriages.

A second edition of Lord Mazareen appeared more recently in the person of an American, Mr. Swan, who was confined twenty-two years in St. Pelagie. This gentleman was in the habit of publishing memorials against his detaining creditors, which he invariably commenced by stating that he possessed more than five millions (francs) in the United States; that it would be easy for him to pay twenty times the amount of the claim, but that it was unjust, and his

conscience did not permit him to purchase his liberty by a dastardly sacrifice. Swan was nearly fifty-two years of age when he was arrested; he was seventy-four at the period of his release, which he owed to the revolution of July. He died two months afterwards.

But to return to M. Berryer. After describing the mode of becoming an advocate, which in those days was much the same as at the present day, the author tells the following anecdotes:—

“Le Maitre, a celebrated advocate of the age preceding, used to amuse himself during the vacation by going into the country, *incognito*, and pleading causes for the peasantry. On one occasion he made such an impression that the provincial magistrate told him he did wrong to waste his splendid abilities on trifling matters in the provinces. ‘Go to Paris, you will there find a fitting field for them; you will become the rival of the famous Le Maitre!’”

On another occasion, Le Maitre, having introduced several Latin quotations with the view of embarrassing the judge, provoked a curious addition to the judgment: “We fine the advocate a crown for having addressed us in a language which we do not understand.”

An advocate, by way of accompaniment to his speech, was flourishing about his hand in such a manner as to show off a magnificent diamond ring. He was young, good-looking, and pleading for a lady of quality who had demanded a separation from her liege lord. The husband, who happened to be present, interrupted him in the midst of his appeal, and turning to the magistrates, said: “My lords, you will appreciate the zeal which M— is displaying against me, and above all, the purity of the grounds on which he relies, when you are informed that the diamond ring he wears is the very one which I placed on my wife’s finger on the day of that union she is so anxious to dissolve.” The Court, says M. Berryer, rose immediately; the cause was lost, and the advocate never had another. What adds to the point of the catastrophe, is the fact that it does not appear that the husband’s state-

ment had the slightest foundation, or that he entertained any suspicion of the sort.

Gerbier, the Erskine of the French bar when M. Berryer first joined it, had a fine Roman head, with a voice of great compass, and his action was peculiarly impressive. He consequently excelled in passages where a dramatic effect was to be produced; and these may almost always be introduced with little risk of failure in France. Thus, in his defence of the brothers Du Queyasat, tried for a cowardly murder, he introduced the Chapel of the Palatinate, in which the sword of one of them, a gallant soldier, had been suspended by the express command of his general, and demanded if this could be the same sword which had been basely turned against the murdered man.

The peroration of his speech for the Bishop of Noyon, prosecuted by his own chapter, affords another example of his style:

“It once fell to the lot of Constantine the Great to receive at his imperial levee several deputies from the clergy, who came to denounce the shamefully irreligious conduct of the primate, their chief. To these virulent accusations, the prince, after having listened to them with the most conscientious attention, made answer: ‘My duty and yours are to place no faith in suspicions, which the impious may be anxious to raise against the sacred character of the primate; so that—to suppose an impossibility—if I surprised him in the very act of sin, I would cover him with my purple!’ It is now for you, my lords, to cover by your decree the sacred person of the Bishop of Noyon.”

Gerbier, aware probably of his weak point, was wont to get two of the best lawyers to discuss the merits of his great causes in his presence. He then chose his topics and formed his plan, but trusted to the inspiration of the moment for the language and the imagery. That the required aid might be constantly at hand, he had always an advocate or two content to play the part of crammers in his cabinet. It was said that Gerbier, in a single cause, had received a fee of 300,000 francs.

M. Duvaudier—an able advocate, though of inferior celebrity, whom the high society

of Paris received on a footing of equality—had an aged client, a woman of quality, who, in the intoxication of success at the happy termination of a suit, conceived the idea of presenting a fee in a novel manner. She repaired first to a notary, by whom she caused the grant of an annuity of 4,000 francs a year to be prepared; then to a coachmaker's, where she ordered a handsome carriage; to a horse-dealer, of whom she purchased two superb horses; lastly, to a tailor, who, by a day named, was to make complete liveries for coachman, footman, and porter.

On the day chosen by the lady, M. Duvaudier was summoned to the Palais for another suit. At its termination, he was accosted by his servant, attired in livery, who informed him that Madame Duvaudier had given orders for the carriage to come for him. M. Duvaudier, a little surprised at the dress of his servant, decided, notwithstanding, to follow him, expecting to learn the key to this enigma from his wife. On reaching the carriage, his surprise increased at finding the coachman similarly arrayed. The footman, on opening the door, begged, in Madame Duvaudier's name, that he would look at a paper which he would find under the cushion. This was the deed for the annuity destined to maintain the equipage.

Toward the close of 1789, the principal tribunals were broken up, and the order of advocates was suppressed. New courts were established, and suitors were permitted to appear by deputy, so that the public gained nothing beyond the substitution of a set of ignorant adventurers for a body of men distinguished by learning and integrity. A small proportion of the ancient bar continued the practice of their profession under its new titles, and amongst the most conspicuous was M. Berryer.

A remarkable suit was instituted by the journeymen carriers against their masters for the amount of a certain percentage on their wages, retained during many years, as the masters alleged, to form a fund in case of sickness. The journeymen were represented by M. Berryer, who seems to have entertained no very exalted opinion of the justice of their claim. But at the time in question, it was a crime of the deepest dye to be a pro-

prietor or a capitalist. Equal rights required unequal judgments, and Le Roy-Sermaise, a judge of the genuine democratic school, decided almost without hesitation for the journeymen.

This worthy was once trying a cause between two peasants, regarding the property in a field. The claimant produced a deed which had nothing to do with the question. The defendant relied upon long possession exclusively. "How long?" inquired the judge. "Why, citizen president, from father to son, eighty or ninety years at least." "In that case, my friend, you ought to be satisfied: each in his turn; it is now your adversary's." He ordered the claimant to be put into possession without delay.—*The Green Bag*.

COUR SUPERIEURE.

MALBAIR, juillet 1890.

Coram GAGNÉ, J.

BOUCHARD V. BLACKBURN.

Certiorari—Cautionnement pour la paix.

JUGÉ:—*Que le plaignant sur poursuite pour cautionnement pour la paix, doit être présent à l'enquête, pour être transquestionné par l'accusé;*

Que l'enquête faite en l'absence du plaignant donne lieu à certiorari, si l'accusé exige sa présence.

PER CURIAM. — L'accusé sur demande de cautionnement pour la paix, n'a pas droit de contredire les faits articulés contre lui; mais il a le droit de transquestionner le plaignant et ceux qui déposent contre lui. Voir *Lancet* qui cite Woolrych. Carter, *Traité sur les conv. som.*, p. 189.

"He cannot be allowed to controvert the facts stated in the complaint, but he should be permitted, from the cross-examination of the complainant or otherwise, to establish that the complaint is preferred from malice only."

Le juge de paix doit faire comparaître le plaignant, si l'accusé l'exige, pour le transquestionner.

S'il n'en était pas ainsi, si l'accusé n'avait pas au moins le droit de transquestionner le plaignant, les citoyens les plus respectables ne seraient-ils pas à la merci du premier venu qui voudrait porter une plainte contre eux?

Je crois que le fait de priver, en pareil cas, l'accusé de l'avantage de transquestionner le plaignant, est suffisant pour justifier l'émanation d'un bref de *certiorari*.

Suivant moi, le juge de paix qui, dans une cause ordinaire, où l'accusé peut offrir une défense, faire entendre des témoins, etc., etc., refuserait à ce dernier le droit de transquestionner les témoins à charge, commettrait une grave injustice, un abus de pouvoir suffisant pour justifier l'émanation d'un bref de *certiorari*. A plus juste raison doit-il en être ainsi quand l'accusé n'a pas d'autre droit que celui de transquestionner.

Quant à savoir s'il y a lieu à *certiorari* sur demande de cautionnement pour la paix, je n'ai aucun doute à ce sujet.

Tous ordres ou jugements des juges de paix peuvent être évoqués à la Cour Supérieure par *certiorari*.

Voir d'ailleurs, *New Digest of cases on criminal law*, vo. Articles of the peace.

"The Court of Queen's Bench has authority "to examine the allegations contained in "articles of the peace when they are brought "up by *certiorari*, and to *quash the articles*, if "no sufficient offence is alleged to justify the "justices in ordering the defendant to give "sureties of the peace."

Angers & Martin for complainant.

J. S. Perrault for accused.

(C. A.)

CIRCUIT COURT.

MONTREAL, December 13, 1888.

Coram LORANGER, J.

SMITH et al. v. BLUMENTHAL et vir.

Note given to creditor to secure his assent to composition.

The action was brought on a promissory note against the defendant, the maker thereof, who pleaded that the note had been given to the plaintiffs to secure their assent to a composition effected by the defendant with her creditors; that this was a fraud on her other creditors, that the consideration was illegal and the note was in consequence void.

Crankshaw, for defendant, cited in support of his plea, *Sinclair v. Henderson*, 9 L. C. J. 306; *Doyle v. Prevost*, 17 L. C. J. 307; *Prevost*

v. Pickle, 17 L. C. J. 314; *Decelles v. Bertrand*, 21 L. C. J. 291; *McDonald v. Senex*, 21 L. C. J. 290.

Duclos, for plaintiffs, submitted,

1o. That the note was valid and consideration legal:—*Greenfields v. Plamondon*, 8 L. C. J. 194; *Perrault v. Larin*, 8 L. C. J. 195; *Bank of Montreal v. Audette*, 4 Q. L. R. 254.

2o. That the cases relied upon by the defendant had all been decided under one or other of the Insolvent Acts of 1864, 65, 69 and 75 and were therefore not applicable.

3o. That the defendant could not plead her own fraud:—*Gareau v. Gareau*, 24 L. C. J. 248; *Leblanc v. Beaudoin & Bedard*, 2 R. L. 625; *Dorion & Dorion*, 3 Q. B. R. 376; *Chapleau v. Lemay*, 14 R. L. 198.

The Court held, following *Chapleau v. Lemay*, that an insolvent debtor, who makes a composition with his creditors, and who, to obtain the assent thereto of one of them, enters into a private agreement with him, cannot subsequently plead the nullity of this agreement.

McCormick, Duclos & Murchison for plaintiffs.

James Crankshaw for defendant.

(C. A. D.)

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

[Continued from p. 391.]

§ 213. Construction of warranties and representations.

Every statement upon the face of the policy is not necessarily a warranty. It must, in order to be a warranty, relate to the risk, and contain something more than "facts incidentally expressed, or introduced by way of recital, or to identify the subject insured, and not purporting on the face of the policy to be stipulations."¹

Where warranties are supposed by the insurers to be involved by the description of the subject insured, must breach of them be

¹ 1 Phillips Ins. Co., 418; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 583.

pleaded, and if not, are they not waived? It ought to be so.¹

Where a policy was issued against sea-risks only on the "good British Brig, called the John," it was held that this description did not constitute a warranty that the vessel was *British*, because the risk of capture being excluded from the policy, the national character of the vessel could have no relation to, or effect upon the risk.²

Also where in a policy against fire, the premises insured were described as occupied by a certain individual as a private residence, it was held that this did not amount to a warranty that that person would continue to be the occupant during the whole duration of the risk; and that if it was a warranty at all, it was merely one that he was the occupant at the date of the policy, and so *semble*, if the policy said, "intended to be occupied by assured as a private residence."³

The Court, however, held in *O'Neil v. Buffalo Fire Ins. Co.*, that if a fact is in express terms *warranted*, it will be considered a warranty, and must be literally fulfilled, notwithstanding its unimportance and entire disconnection from the risk, but where it is otherwise, and is sought to be made a warranty because it is stated upon the face of the policy, it must relate in some degree to the risk.

Arnould favors the rigid rule that every allegation in the policy amounts to a warranty and must be literally fulfilled. 1 *Arnould, Ins.* p. 584, *Perkins' Ed.* 1850; while Phillips recognizes the distinction taken in the cases above cited, but holds that it must be rigorously confined to cases where it plainly appears that the fact alleged could not possibly, in the opinion of any man, have any relation to the risk assumed. 1 *Phillips, Ins.* 418. But it will be presumed that every fact, stated in the policy does

relate to the risk, until the contrary is shown, *id.*

In the *Sexton* case,¹ the judge said the statement in descriptions or policy that *house insured* is distant — feet from other buildings, make a warranty. Some judges, in other cases, say if only moveables are insured, and such statement as to buildings be incorrect, that the insured may yet recover.

In *Blood v. Howard Fire Ins. Co.*,² it was held that a statement that the building insured is fastened up and occupied only occasionally for a stated purpose, although a warranty by the express terms of the policy, is only a warranty of the *then* situation of the property, and is not a warranty that it shall so continue. A change in the use of the building, not increasing the risk, will not of itself avoid the policy.

In *Bay State Glass Co., v. People's Fire Ins. Co.*,³ to the question, What is used for fuel? the applicant answered coal, wood and resin in small quantity. The answers were made warranties, and one condition on the policy was that the insured should notify the company of any change or alteration of risk. Held, that this was a warranty of the *then* existing habit or custom, which might afterwards be changed if in good faith, and so that the risk was not increased.

A statement by the assured that a machine in the building insured "is for burning hard coal," is not a warranty not to burn other fuel.⁴

But the courts will look into the intention of a warranty, and will not construe it more strictly than it really imports.

In an application for insurance on a building, which was in terms referred to in the policy as forming a part thereof, occurred the question, "How bounded, and distance from other buildings if less than ten rods." The answer in the same application stated the *nearest* buildings on the several sides of the insured premises, but did not mention *all* the buildings within ten rods. Held that

¹ *Mayall v. Mitford*, 6 A. & E.

² *Mackie v. Placenta*, 3 Binney, 363; and see also a dictum of Sutherland, J., to the same effect in *Francis v. Ocean Ins. Co.*, 8 Cowen, 430.

³ *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comstock, 122; See also *Cutlin v. Springfield Fire Ins. Co.*, 1 Sumner, 424.

¹ 9 Barbour.

² Monthly Law Reporter, A.D. 1858, Supreme Court, Mass.

³ Monthly Law Reporter, A.D. 1857, p. 566.

⁴ *Tillon v. Kingston Mut. Ins. Co.*, 7 Barb. 570.

such answer was not a warranty, that there was no other building within that distance than those mentioned.¹

But *aliter*, when the question in the application was "relative situation as to other buildings, distance from *each* if less than ten rods."

Per Story, J., in *Catlin* case:—"Suppose a policy against fire insuring the house of A in Boston described as occupied as a dwelling house, would the policy be void, if the house should cease for a time to have a tenant? Such a doctrine has never been asserted."

If asked how many stoves in the house the applicant say two when there are three or six, the untrue statement will avoid the policy, where the statements in the application are stipulated warranties.²

Suppose A to insure a house bought by him by this description:—"A house in the parish of—upon the lot of land next to—in which house the assured intends to reside and in which he has now a servant man. Does that warrant that he should reside? No! he need never reside.

A statement on a plan, or diagram, that ground contiguous to the building insured is "vacant" does not amount to a warranty that it shall continue vacant during the continuance of the risk. (373) 3, Kent's Com. No; unless the vacant land were property of the insured. If it were, and if insured himself were to build upon it, after effecting a policy, and if extra hazard was created by the new building, the insurer would be free. *Stetson v. Mass. M. F. I. Co.*, 4 Mass. R. But if extra danger or hazard not proved, policy not to be voided.

If the diagram be part of the policy, would it not be warranty? Yes. In the case of *Stebbins v. The Globe Ins. Co.*, 2 Hall, the diagram was not part of the policy.

¹ *Gates v. Madison Co. Mut. Ins. Co.*, 2 Comstock, 43; S. C., 1 Selden, 469.

² *Burrill v. Saratoga Co. Mut. Ins. Co.*, 5 Hill 183; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio 75; See also *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comstock 122; *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner 434; *Houghton v. Manufacturers' Mut. Ins. Co.*, 3 Metcalf 125.

³ *O'Neil v. Ott. Agr. Ins. Co.*, vol. 30, C. Pl. Rep.

Mayall v. Mitford (6 Ad. & E.) was a case of insurance of machinery in mills, and assured "warranted that said mills are brick built, warmed and worked by steam, lighted by gas, and worked by day only;" it was held that the stipulation as to working by day only meant that the usual cotton manufacture carried on by the mills in the day time should not be carried on at night; and that it was not a breach of the warranty that on one occasion, in order to turn machinery in an adjacent building, the steam engine and certain perpendicular and horizontal shafts in the mill were at work.

Macmorran & Co.,¹ cotton and woollen spinners, insured goods and machinery in their mill, with the Newcastle-upon-Tyne Fire Insurance Company. The policy was dated April 16, 1805, and contained a receipt for the premium, which was accounted for to the company by Hamilton, their agent at Glasgow, through whom the insurance had been effected. The policy was retained by Hamilton till September 5, 1805, when it was delivered to the insured upon their paying him the premium.

Printed proposals formed part of the contract, and besides being referred to, a copy was delivered to the party insuring; and it was there set out, among other things, that if any "person or persons shall insure "his, her or their houses, mills, &c., and "shall cause the same to be described in "the policy otherwise than as they really are, "so as the same shall be insured at a lower "premium than proposed in the table, such "insurance shall be of no force."

December 7, 1805, the mill was burnt, and the insurers refusing to pay, the insured brought an action before the Court of Session, concluding for payment of £1647 and interest from December 7, 1805. The insurers stated several reasons of refusal to pay: first, that there was fraud and false swearing as to the amount of the loss; second, that the fire was intentional; thirdly, the mill was warranted of first class.

Upon proof it appeared that there was no foundation for charge of intentional firing;

¹ *Newcastle Fire Insurance Company v. Macmorran & Co.*, 3 Dow. 255.

but it also appeared that at the date of the policy the premises were of the second class, contrary to the warranty. In answer to this it was alleged that Hamilton, the agent, had taken it for granted that the premises were of the first class, and made out the policy accordingly, without any representation on the part of the insured; and that before the policy was delivered, the premises had been altered so as to bring them within the first class. The Court below decreed against the insurers and they appealed.

Lord Eldon, C.—This is an appeal by the Newcastle Company from a judgment of the Court of Session, by which they were held liable in the payment of a sum of £1647 upon a policy of insurance, and the question is, whether this judgment was right or not?

The policy described the subjects insured, and then followed the words "warranted" "that the above mill is conformable to the" "first class of cotton and woollen rates" "delivered herewith."

The materiality of them consisted in this, that if the mill was not of the first class, a larger premium ought to have been given.

The appellants represent that in the second set of proposals for the insurance of cotton mills, &c., certain classes of buildings were specified, according to the particulars of which the premium is at a higher or a lower rate.

Thus, class 1 comprehends "buildings of" "brick or stone and covered with slate, tile," "or metal, having stoves fixed in arches of" "brick or stone on the lower floors, with" "upright metal pipes carried to the whole" "height of the building, through brick flues" "or chimnies, or having common grates, or" "close or open metal stoves or coakles stand-" "ing at a distance of not more than one foot" "from the wall, on brick or stone hearths," "surrounded with fixed fenders." I request your lordships' particular attention to the words following, "and not having more than" "two feet of pipe leading therefrom into the" "chimney," &c.

Class 2 comprehends "buildings of brick" "or stone, and covered with slate, tile, or" "metal, which contain any singeing frame," "or any stove or stoves having metal pipes" "or flues more than two feet in length," &c.

This mill was burnt and an action was brought to compel payment. As to the defence that the premises had been wilfully set on fire, there was no ground for it; and the Court of Session seems to have thought that there was no ground for the imputation of fraud and overvalue.

But there was another very material point of defence stated, that this mill which was warranted as being of the first class, with a pipe of two feet, was in reality of the second class; and that being of the second class whether there was fraud or not; whether the mis-statement on the part of the insured arose from fraud, or from mere error or inattention, or the mistake of an agent, (unless they were misled by the agent of the Newcastle Company,) or from whatever other cause, the contract never had effect.

Evidence was gone into as to whether the mill was of the first or second class. The Court of Session seems to have thought it immaterial whether it was or not. But if the mill was warranted as of the first class and was really of the second the judgment of the court below was clearly erroneous; for it is a first principle in the law of insurance on all occasions that where a representation is material it must be complied with; if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty, it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact.

My impression is, that the mill was not such as it was warranted to be, and that therefore all consideration of fraud or overvalue is out of the question, unless it can be effectually answered that the insured were misled by the insurers or their agent.

They say that the misrepresentation was owing to the agent of the Newcastle Fire Company. I cannot say, however, that they have made out that point.

The insured say that there was no effectual policy till the premium is paid, and refer to the term of the fourth article of the printed proposals, which declares "that no insurance is considered by this office to take place till the premium is actually paid by the insured,"

his, her, or their agent or agents." The premium they say was not paid till a considerable time after the date of the policy, and that the alteration was made which brought this mill within the description of the first class of mills before the premium was paid, and that the alteration had been communicated to the agent of the company. The company deny that any such communication was made, and even if it had been made, it would have been still necessary to consider how far that circumstance could alter the law as applicable to the case. But as the fact was denied, and there was no proof of it, that point may be considered as out of the question. With respect to the effect of the article referred to, the appellants contend that it did not relate to the first policy, but to the renewals of policies. But in the present case it is not necessary to consider whether it related to the first policy or any renewals of it, as they say that as between the respondents and them the premium had in point of fact been paid before the alteration took place, as the Scotch agent had accounted for it to his constituents, the Newcastle Company, before the period of the alteration, and it had therefore become a personal debt due to him from McMorran & Co. That may be considered as an answer to the argument raised upon that ground. But suppose that were entirely out of the question, we must proceed *secundum allegata et probata*. If the assured could succeed at all on this summons it must be on a policy or contract dated April 16, 1805, and when they have founded upon that only, they cannot afterwards turn round and say, though we cannot succeed on that policy we are entitled to recover on a subsequent contract. See how the contract would be varied. This was a bilateral contract of the date of April 16, 1805, from which period to June 24, 1806, the premium was acknowledged to have been paid; and it was agreed that a certain premium should continue to be paid on June 24, *de anno in annum*. Can your lordships convert that into a transaction commencing not in April, but in September 1805?

Acquitting McMorran & Co. of all fraud in the business, the question is reduced to this: "Are you, McMorran & Co., looking

to the facts and evidence as applicable only to the policy of April, 1805, entitled to recover under this contract?"

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 6.

Judicial Abandonments.

A. David Damphouse, farmer, parish of St. Timothé, Nov. 11.

Charles O. Dubois, trader, Hull, Nov. 26.

Riopel & Hétu, contractors, Montreal, Nov. 28.

Edouard F. Lavoie, provision merchant, Quebec, Dec. 4.

Victor Lesage, trader, parish of St. Jeanne de Neuville, Nov. 29.

P. & F. Ouellet, traders, Quebec, Nov. 26.

Ananias Renaud, trader, parish of St. François Xavier de la Petite Rivière, Nov. 12.

J. Philéas Samson, boot and shoe dealer, Lévis, Nov. 7.

Curators appointed.

Re Dumas & Lortie, traders, Hébertville.—H. A. Bedard, Quebec, curator, Dec. 2.

Re J. E. Garneau, dry goods, Three Rivers.—David Seath, Montreal, curator, Nov. 28.

Re James Jessup, trader, Newport, Gaspé.—H. A. Bedard, Quebec, curator, Dec. 1.

Re Achille Labine, Montreal.—Kent & Turcotte, Montreal, joint curator, Nov. 29.

Re Arsène Morin.—C. Desmarteau, Montreal, curator, Dec. 2.

Re Francis Charles Silcock, agent, Montreal.—P. E. E. de Lorimier, Montreal, curator, Nov. 29.

Re A. Tardif & Co., traders, Quebec.—H. A. Bedard, Quebec, curator, Nov. 29.

Re Charles H. Wade, Montreal.—A. W. Stevenson, Montreal, curator, Dec. 2.

Dividends.

Re Jos. Beaudoin, St. Luc de Champlain.—Second and final dividend, payable Dec. 23, C. Desmarteau, Montreal, curator.

Re A. P. Desroches.—First and final dividend, payable Dec. 24, C. Desmarteau, Montreal, curator.

Re E. T. Favreau.—First dividend, payable Dec. 17, Bilodeau & Renaud, Montreal, joint curator.

Re Dame Marie Goyette.—First dividend, payable Dec. 20, J. A. Nadeau and Joseph Lavoie, Iberville, joint curator.

Re Letourneau & Paré, merchant tailors, Quebec.—First dividend, payable Dec. 22, H. A. Bedard, Quebec, trustee.

Re J. D. Tellier, Sorel.—First and final dividend, payable Dec. 26, Kent & Turcotte, Montreal, joint curator.

Separation as to property.

Marie Louise Milot vs. Joseph Major, carriage-maker, Montreal, Nov. 27.

The Legal News.

VOL. XIII. DECEMBER 20, 1890. No. 51.

The practice of giving a long *congé* to judges who become indisposed does not appear to meet with favor in England. In the case of Lord Justice Cotton, for example, the intimation of his illness was almost immediately followed by the announcement that he had retired from the bench. Baron Huddleston, another very energetic judge, fell ill last August while on Circuit, but declined to take rest, and charged the grand jury from his bed. (See *ante*, p. 273). His lordship almost immediately resumed work, and went on trying cases during the hot weeks of August. Now comes the announcement that he is no more. Chief Justice Coleridge was also taken ill last month while hearing a case in Court, but his lordship has recovered sufficiently to permit him to resume his judicial duties. The work in England is so continuous and severe that the absence of a single judge deranges the machinery, and imposes an undue strain upon his colleagues. For example, when the autumn assizes commenced last month, only five out of the fifteen judges of the Queen's Bench Division were left in London, to dispose of the long lists of common law actions.

In the action of damages brought by Edith Sessions Tupper against Morin, superintendent of police at Buffalo, for the arrest which recently caused some stir, Daniels, J., of the Supreme Court of New York, in rejecting the defendant's motion to vacate the order of arrest in the suit against him, said:—"The plaintiff was arrested in the city of Toronto for felony committed in the city of Buffalo. The arrest was made without process and wholly upon information proceeding from the defendant. The orders to arrest her were sent by telegraph and were positive in their nature. And those positive orders were repeated after some evidence of the identity of the person had disappeared. She was not the felon, but in a strange city, alone, and in

the night time, she was arrested for the crime of another, in which she was not only not a participant, but knew nothing whatever of its commission, or the person who committed it. This was an unwarrantable interference with her personal liberty, and should not have been ordered without very satisfactory evidence against her. The defendant claims to have been supplied with that degree of evidence. But the fact that he was, or that he acted with that degree of caution which is due to the liberty and security of an innocent person, is not so clearly established as to justify an order vacating the order for his arrest in this action for damages. An officer may make, or direct, the arrest of a person for a felony without a warrant. But to escape liability for making an unfounded arrest he must be able to excuse himself by proof that he had reasonable cause for believing that the person arrested had committed the crime."

NEW PUBLICATIONS.

THE BILLS OF EXCHANGE ACT, 1890: by Thos. Hodgins, Q.C. — Publishers, Rowsell & Hutchison, Toronto.

It seems probable that the Act passed last session, relating to Bills of Exchange, Cheques and Promissory Notes, will be elaborately commented, as announcements were some time ago issued by three Toronto publishers, intimating the early publication of works by three several Queen's Counsel treating of the new law. A fourth work, by a Montreal Q. C., has also been announced. The first in the field is Mr. Hodgins' book which is now before us. Prepared necessarily in some haste, it seems to embody a tolerably full collection of decisions, carefully classified under the several sections of the Act. An introduction covering twenty-four pages will be found interesting. From it we learn that bills of exchange were known in England as early as A.D. 1307, since Edward I. in that year, ordered certain moneys, collected in England for the Pope, not to be remitted to him in coin or bullion, but by way of exchange—*per viam cambii*. About the commencement of the seventeenth century the practice of making bills payable to order, took its rise. Some writers state that the first known mention of

the endorsement of these instruments occurs in 1607. From its obvious convenience it speedily came into general use; and, as part of the general custom of merchants, received the sanction of the courts. In the meantime, promissory notes had also come into use, differing from bills of exchange in that they were not drawn upon a third party, but contained a simple promise of the maker to pay. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had become established, promissory notes were also made payable to order and transferable by indorsement. The practice of drawing cheques may be said to have originated with the London goldsmiths, who were the first English bankers. They became the depositaries of the money of merchants, and when a customer wished to make a payment to another, he would write a note to his goldsmith, or banker, requesting him to pay the amount required to the person named. Some of the early reports show that there was a struggle between the merchants and the courts, before the latter would fully recognize the force of mercantile usage. The first Canadian legislative enactment on the subject was an ordinance passed in 1777, for ascertaining damages on protested bills of exchange (17 Geo. III, c. 3).

In connection with this subject it might be well, perhaps, if the Senate debate on the bill were reprinted from the official report and embodied by way of supplement. Some of the promised works on the Act may perhaps include this feature.

TEXT BOOK SERIES.—Blackstone Publishing Company, Philadelphia, Pa.

The Blackstone Publishing Company have issued as No. 36, in their series of text-books, a very complete index of subjects treated upon in the Text-Book Series. This gives the subscriber not only a list of all the books in the text-book series which treat of each subject, but also the pages, so that he can gather all that is contained in the series upon any given subject. Thus, if he turns to the subject "Contract" in the Index, he

will be referred to the matters in the several volumes which relate to this subject. This bringing together and classifying the books with regard to the different subjects, will make the collection both serviceable and valuable.

REPORTS OF AMERICAN BAR ASSOCIATION.

The American Bar Association have issued the report of their thirteenth annual meeting, held at Saratoga Springs, N. Y., Aug. 20-22, 1890. The report, as usual, contains addresses upon several subjects of considerable interest to the profession. The next annual meeting of the association will be held at Boston, Aug. 26-28, 1891.

COUR SUPÉRIEURE.

MALBAIR, 18 juillet 1890.

Coram GAGNÉ, J.

In re GEO. DUBERGER, Failli; et DIVERS CRÉANCIERS, Colloqués, et DME M. A. ROY, Contestante.

- JUGÉ:—1o. *Que les jugements rendus contre un débiteur peuvent être attaqués par ses créanciers comme rendus en fraude de leurs droits.*
 2o. *Que la tierce-opposition n'est pas autre chose que l'action paulienne appliquée aux actes judiciaires.*
 3o. *Que le jugement annulant la séparation de biens profite à tous les créanciers du failli.*

Voici le jugement:—"Attendu que Dame M. A. Roy, épouse du dit failli, conteste la feuille de dividende préparée par le curateur aux biens du dit failli, alléguant qu'elle a obtenu un jugement de séparation de biens d'avec son dit mari, en février 1889, que ses droits et reprises ont été, par rapport du praticien nommé par ordre de la Cour, établis à la somme de \$4,600; que cette somme est une créance privilégiée et qu'elle aurait dû être colloquée de préférence à tous les autres créanciers;

"Attendu que la dite Dame M. A. Roy conteste en outre, les collocations de G. Filion et Joseph Sheehy;

"Attendu que le dit Filion a répondu à la dite contestation et en a demandé 'le renvoi,'

alléguant que le susdit jugement de séparation a été, par jugement de la Cour Supérieure, à la Malbaie, rendu le 18 novembre 1889, et confirmé par la Cour de Révision à Québec le 28 février dernier, déclaré nul et de nul effet, et annulé à toutes fins que de droit, comme paraissant avoir été obtenu par collusion, et en fraude des créanciers du dit failli, et ce à la demande même du dit G. Filion, par sa tierce-opposition, produite à l'encontre du dit jugement de séparation de biens ;

"Attendu en fait qu'à la demande, et sur la tierce-opposition du dit Filion, le dit jugement de séparation de biens a été, ainsi que les procédures subséquentes, déclaré nul et de nul effet comme paraissant avoir été prononcé pour favoriser la demanderesse, Dame M. A. Roy, au détriment des créanciers de son mari ; dont le tiers-opposant était l'un, et en fraude de leurs droits ;

"Considérant que les jugements rendus contre un débiteur peuvent être attaqués par ses créanciers comme rendus en fraude de leurs droits ;

"Considérant que la tierce-opposition n'est pas autre chose que l'action *paulienne* appliquée aux actes judiciaires ;

"Que le jugement annulant comme susdit, et pour les raisons susdites, le jugement de séparation de biens obtenu par la dite contestante, et les procédures subséquentes, a profité et profite aux autres créanciers du dit failli ;

"Que la dite contestante ne peut en aucune façon se prévaloir du dit jugement vis-à-vis des créanciers du dit failli, et spécialement vis-à-vis du dit Filion à la demande duquel le dit jugement a été annulé ;

"Considérant par conséquent que la dite contestante n'est pas légalement séparée de biens vis-à-vis des créanciers du dit failli et spécialement vis-à-vis du dit Filion, qu'elle n'est pas créancière du dit failli, et qu'elle n'a pas qualité pour contester la feuille de dividende préparée par le curateur aux biens du dit failli, ni pour contester la collocation du dit Filion, renvoie la dite contestation de la dite Dame M. A. Roy, etc."

Vide Bédaride, *Dol et fraude* ; Demolombe, vol. 2, des contrats, chap. de la fraude. J. S. Perrault pour la contestante.

Angers & Martin pour G. Filion.

(C. A.)

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VII.

OF REPRESENTATION AND WARRANTY.

[Continued from p. 400.]

If this is to be taken as a contract of April, 1805, and the premises were not of the class of which they were warranted to be, it appears quite clear that the respondents ought not to have recovered. If the Court of Session was of opinion that the risk was not greater in mills of the second class than in those of the first class, though that were sworn to by five hundred witnesses, it would signify nothing. The only question is, "what is the building de facto that I have insured?" [The judgment of the Court below was reversed.]

A man has a mill with a building next to it. Between the two, (it is stated,) is a door of iron. Suppose a fire, and all to be lost, from the iron door having been left open. Semble. If without gross negligence, the assured shall recover.¹

CHAPTER VIII.

INTERPRETATION OF THE CONTRACT.

§ 214. *The general rule of interpretation.*

The imperfection of language, the want of attention in writers of acts, ambiguities and obscurities of acts—these are what call for interpretation properly called. To ascertain the veritable sense of acts obscure or ambiguous, that is the object of rules of interpretation. The Roman law is the great fountain. Policies of insurance are not to be construed differently from other contracts,—the intention of the parties is always to be sought for.

It is by common intention of the parties that we must explain what may be obscure in the convention.

1st. This intention common is discovered by words. Words are to be construed by general usage. The general rule is that the literal interpretation is to be taken, but on

¹ Stuart's Rep., p. 148.

this point a uniform universal rule cannot be laid down.

Another rule is that the intention of both parties is to be carried out.

§ 215. *Literal interpretation not always to be adhered to—Intention of parties.*

A clause requiring the certificate of a magistrate as to character, etc., of the assured and amount of his loss, does not require a strict *literal* compliance. The insured furnished a certificate of a magistrate—it was objected to as not that certificate required by the conditions. Magistrate "most contiguous." It was proved on the trial that there were magistrates nearer.¹

But was there not in this case a speciality? Insurance Company had refused to return to the assured his *proofs*, alleged informal. Yes!

Sometimes it depends upon who is suing as to how the interpretation is to be. If a man contract with me to make a road from Montreal to Lachine, he may say, if I sue him, that he has done the job, having made a road from Montreal to Lachine line (line of Lachine parish), and that that is all the letter obliged him to do; and that the interpretation is to be in his favor, *à sa décharge*, he being defendant.

But, if he sue me to pay before he has gotten to Lachine village, I may say I intended Lachine village; if there is ambiguity, it is to be interpreted to my discharge, I being sued as contractor of or for the money, or obligor.²

The literal terms of the contract are to be overruled, if need be, to carry out what was the most probable intention of both parties.

If a man buy fifty yards of blue cloth from another, one piece is to be given. The seller cannot insist upon offering fifty yards in separate pieces; yet, so offering, he offers a literal fulfilment of his contract, and he might give yards of different shades. Intention is to be got at.

Where the intention of both parties appears, effect must be given to it against the

clearest words. L. 219 *de Verb. Sig.* ff. 50, 16. But the words, if clear, must be followed, even against the intention of *one* of the parties.¹

Literal interpretation sometimes must give place to interpretation according to intention. Suppose a policy to be vacated, unless notice of fire be given to the secretary of the company, at the company's office, on the first day of the month next following, and that notice was given on the day after the fire; would that be fatal? Yet, in grants, may not a duty be to be performed on a particular day, else *déchéance* to be?

Literal interpretation in some cases might be unjust in the extreme. Suppose ashes are required by the policy to be kept in a brick chamber, and be really kept in a stone or iron one, equally safe; there would be forfeiture, if the clause be literally interpreted.

Effect ought to be given to conditions according to the intention of the parties. The intention of both parties ought to be looked for, the nature of the contract considered, and more ought not to be exacted from either party than what he meant by the contract, most probably.

In interpreting the contract of fire insurance, the rule of strict and literal interpretation is most often enforced, yet unwillingly in some cases. It is sometimes said that it would be the height of injustice to enforce it.

When we consider the nature of the obligation undertaken by the insurer, to pay if fire hurt or destroy the property insured, in connection with clauses prohibiting the use of camphene oil, the storing of gunpowder, the depositing of ashes in wooden vessels, etc., we can see the intention, probable, of both parties that, generally, the insurer should pay if loss by fire happen, but that he should go free if the use of camphene oil, the storing of gunpowder, or the depositing of ashes led directly or indirectly to the loss; yet literal interpretation is made in all such cases in England and the United States; and in Lower Canada the Courts are becoming by

¹ *Turley v. The N. A. Fire Ins. Co.*, 25 Wendell.

² *Derby line* is a well-known village: yet a Yankee agreeing to run a road to Derby line was held not bound to go to the village.

¹ In bi-lateral instruments, the words, if clear, must be followed, even against the intention of *one* of the parties. Lindley [51.] As if a Syrian of the desert being in London, should buy beasts of burden, horses may be forced upon him though of no use to him.

degrees to enforce literal interpretation. True that some judges hold that mere prohibitions will not avail, in such cases, to avoid a policy, though the use of camphene oil be, etc., unless *peine* be annexed. The parties may insert in the policy any conditions not prohibited by law, nor contrary to good morals.

§ 216. *Construction in case of ambiguity.*

If the words are ambiguous, the interpretation is to be *contra proferentem*—*contre celui qui a stipulé quelque chose à la décharge de celui qui a contracté l'obligation*. Chief Justice Cockburn, in *Fowkes v. Manchester Ins. Co.*,¹ makes the company the *proferentem*, the application or instrument prepared by them, and by them submitted to the insured for his signature. It ought to be read against the company.

Suppose endorsement on policy to be required, but the insurance company indorse the second insurance on the premium receipt only, this would certainly be held good.

In all policies there are two *proferentes*. Some clauses in the policy are to be considered proffered by the insurer, others by the insured.²

In *Notman v. The Anchor Ins. Co.* it was held that the insurer who wrote the description of the intention of the insured was the *proferens*.

Words in a policy ought not to have a sense more large than results from the expressions used. Casaregis, disc. 1, n. 108; 1 Alauzet, p. 368.

Ambiguities in a policy are to be interpreted against the insurance company.³ But the court in Paris (12 Dec., 1840,) interpreted in favor of the insurer, as being the person obliged. And Grun and Joliat say, in cases of doubt the interpretation should be in favor of the assurer as being the *obligé*.⁴

¹ 3 B. & S., 925.

² In Roman law—he who stipulated was the creditor. He interrogated, and the debtor (he was called *reus promittendi*), or obligor, answered. So it was that obligations were contracted.

Q. Promittis? A. Promitto.

Q. Dabis? Dabo.

³ See Art. 1019, C. C. of L. C. Sirey of 1846, 2nd part, p. 12. Paris, 1 Aug., 1844, 2nd chamber.

⁴ Literal interpretation is not absolutely the rule in contracts. Suppose I buy an *Encyclopædia Britannica*, 25 vols., bound in Russia; can the seller insist upon my taking a copy though bound in Russia, but in common Vermont sheep?

In *Corse v. Lancashire Ins. Co.*,¹ the defendants pleaded that the word "isolated," according to the usage of fire insurance companies, meant not within 60 feet of other buildings. How would this work in cities and villages?

Words are to be taken according to their common use,—what the words immediately suggest to the minds of the general public or common people.

Interpret as insurance companies would have it, and the consequences would be such as could never have been in contemplation of the parties, e.g.,—a stable being at 12 feet off, can we suppose that the insured meant to warrant that it was not within 60 feet! that no building was within 60 feet! Is the expression "isolated," ill-used here, seeing that, 12 feet off, though separated by that space (12 feet) was a stable? I hold not. As to usage—no evidence of it should be admitted to substitute a conjectural intent for that which the policy plainly expresses. The judge should decisively charge to reject such proofs. § 30, *Ib.*, p. 179.

Still, usage may be proved of things if it can be presumed as known to the parties, and that the contract was framed in reference to its existence.² But let this usage only be in commerce, and not in real property affairs.

How various may be the disputes upon words! Suppose a policy to state that if the house be unoccupied at any time by the space of three continuous weeks, the policy, *ipso facto*, is to be vacated. Well! the house after a month is left in charge of only one man, guardian. Is the policy vacated? Suppose the house large as Eaton Hall! Suppose it small! Can a house in charge of a guardian living there, be held unoccupied? I say no, literally.

Yet argument might be as to what was intended.

Insurance is effected on a mill, and a condition of the policy is that ten buckets filled with water are to be kept always on all the flats above the basement. Now, suppose the next paragraph or condition to say: "Fifty buckets to be kept in the basement;" would

¹ Montreal, November, 1870.

² "Rice" may be covered by the word "corn."

this mean *filled with water*? Literally not, yet logically yes. *Noscitur a sociis*. Tautology here is just avoided by the omission of the words "filled with water," which must be understood. Yet, may not distinctions be made? Suppose the mill was at the side of a canal. It might be argued that the fifty were for the neighbors to get water with from the canal, and that they were in the basement for that convenience. I would hold, however, that even in case of neighborhood to the canal, the buckets should be full always in the basement, for such is the contract, and the contract may have had a double object, full buckets at first on hand, and a quantity ready to refill soon. See vol. 24, Alb. L. J., p. 363, for a case in the Vermont Supreme Court, *Carrigan v. Lycoming Fire Ins. Co.* It was held that the printed parts of the policy should be construed so as to confine them to the intention of the parties, as expressed in the written parts of the policy. Benzine was held a drug. Stock, including drugs and medicines, were insured by the written part; the printed part prohibited benzine. The company's agent was proved to have said that benzine was allowed. If so, why did not the insured get the pen drawn through the printed part, or have benzine *allowed expressly*?

Against the above case is 33 Am. Rep., 778.

§ 217. The rule "*contra proferentem*."

The rule *contra proferentem* (approved by Bacon) has little influence, or value, says Parsons. (Vol. 2, p. 23.)

Query, *de hoc*. Does it not lie at the bottom of the rule in sales and leases by which the interpretation is to be against the seller as a *proferens* etc.?

In the law of Lower Canada a clause that is not of certain meaning is interpreted against him who got it put into the Act; he ought to have been more clear; he ought not to have written an equivocal phrase. (He, for whose profit, or purpose, a clause is put into an Act, is supposed to have put it in.) Instr. fac. sur les con., p. 72.

But who is the *proferens* in the policy? I think it is the insurance company, who promise to pay, subject only to the conditions written by them.

SUPERIOR COURT—MONTREAL¹

Capias—Intent to defraud.

Held:—That when the debtor has judicially abandoned his property for the benefit of his creditors, and after unsuccessfully endeavouring to secure employment and to earn a livelihood in this province, finally accepts a position abroad, intent to defraud is not to be presumed from his intended departure, and the *capias* under which he has been arrested should be quashed.—*Shotton v. Lawson*, de Lorimier, J., Oct. 28, 1890.

Substitution—Final alienation of property of— *Art. 953, C.C.*

Held:—That the final alienation of the property of a substitution cannot validly be effected while the substitution lasts, except in the manner indicated in Art. 953, C.C., and that the sale of such property by judicial authorization on the advice of a family council, and with the consent of the curator to the substitution, is null and void.—*Joyce v. Hodgson*, Gill, J., Dec. 16, 1889.

Testamentary executors—Replacement of—Art. 923, C.C.—Action by wife's executors to recover a propre—Sufficiency of allegations—Replacement of propre—Arts. 1303-1306, C.C.

Held:—That where the testator has given his testamentary executors power to appoint substitutes, such power may be exercised even after the testamentary executors have commenced to act.

2. It is not necessary that the replacement should be made judicially, unless the testator has so directed. A notarial declaration naming substitutes is legal and regular.

3. In an action by the wife's executors against the husband, to recover possession of a *propre* belonging to her, it is sufficient to allege that the immovable in question was purchased by the wife, during her marriage with defendant, with her own money and in her own name, with the consent and authority of her husband the defendant. The omission to state specifically that the immovable was a *propre*, being purchased with the pro-

¹ To appear in Montreal Law Reports, 6 S.C.

ceeds of a *propre* of the wife, and in replacement of it, is not fatal to the action.

4. Where a wife purchases property in her own name and with her own money, in replacement of a *propre*, a formal acceptance by her of the replacement is not necessary.—*Kennedy v. Stebbins*, Tait, J., Oct. 31, 1890.

Gift—Verbal promise—Art. 776, C. C.—Improvements.

Held:—(Affirming the judgment of BROOKS, J.) That a promise of a gift of real property, without legal consideration, made verbally, is null; but where the promisee entered into possession of the immovable in pursuance of the promise, it was sufficient to make him possessor in good faith, and therefore entitled to the value of his improvements if proceedings were taken to evict him.—*Montgomerie v. McKensie*, in Review, Johnson, C.J., Würtele, Tellier, JJ., Nov. 15, 1890.

Promissory note—Consideration.

Held:—That, in the absence of legislative enactments prohibiting the same, and in default of an Insolvent Act whereby the majority of the creditors would bind the remainder to the conditions of a composition and discharge, nothing invalidates, as between the debtor and his creditor, an agreement by which the debtor undertakes to pay such creditor more than the amount of said composition and discharge, and a promissory note given to cover such excess is valid.—*Racine v. Champoux*, Gill, J., Nov. 7, 1890.

Principal and agent—Agent acting within scope of his apparent authority.

Held:—Where wines were ordered by the secretary-treasurer of a club, who had apparent authority to purchase supplies for his club, and the wines were invoiced and consigned to the club, that the latter were liable for the price. To establish a defence in such case it would be necessary to show not only that the act of the agent was unauthorized, but that the party dealing with the agent had notice thereof.—*Gourd v. Fish & Game Club*, Würtele, J., Nov. 26, 1890.

Railway expropriation—Award of arbitrators—Nullity of award.

Held:—1. An appeal by which the Court is called upon to modify an award of arbitrators in an expropriation under the Railway Act of Canada, by either increasing or diminishing the amount allowed by the arbitrators, can only be taken when a valid award exists.

2. By Section 152 of the Railway Act, no valid award can be made except at a meeting of the arbitrators of which any absent arbitrator had two clear days' notice, or to which a meeting at which he was present had been adjourned.—*Denis dit St. Denis v. Cie. de Chemin de Fer de M. & O.*, Würtele, J., Dec. 2, 1890.

COURT OF APPEAL.

LONDON, Oct. 27, 1890.

Before LORD ESHER, M.R., LINDLEY, L.J.,
LOPES, L.J.

WHITE v. BOLCKOW, VAUGHAN & CO. (LIM.)

Practice—Trial before Jury—Application for New Trial on ground that Verdict against Weight of the Evidence.

Appeal of defendants from the decision of a Divisional Court refusing a new trial of an action tried before DAY, J., and a jury.

The Court dismissed the appeal.

LORD ESHER, M.R., in delivering his judgment, said: As this is the first case of the kind that has come before us since it has been settled that this Court shall hear all applications for new trials, even where the action has been tried before a jury, I shall venture to emphasise what has often been said in this Court before now. I think one of the great objects of the Judicature Acts was to prevent a repetition of trials in an action, and the Court, therefore, where the action has been tried out before the proper tribunal, will not order a new trial but with extreme reluctance, and will struggle to avoid doing so, if justice can be done without imposing upon the parties so burdensome an infliction. Therefore, whether the grounds of the application be misdirection, misreception of evidence, or that the verdict is against the weight of the evidence, the Court will en-

deavour to come to a final determination in the matter without granting a new trial. This rule applies most strongly where the suggestion is that the verdict is against the weight of the evidence. When the proper tribunal has been called in by the parties, and they have done their best or worst before it, and have got the decision of that tribunal, that decision must not be set aside except on very weighty, almost imperative, grounds. The formula, which has often been stated here, applies—namely, that, if a verdict is under all the circumstances, one which twelve reasonable men might fairly find, the Court will not set it aside on the ground that it is against the weight of the evidence. Each case, of course, must depend upon its own particular circumstances, but it is enough for me to say that the Court will be very strict to follow the formula I have stated, and that where the question turns upon the credibility of the witnesses on either side it will be almost impossible to set aside the verdict of a jury, unless some fact is incontestably established, which makes it impossible that the verdict can be right or so improbable that the Court cannot accept it. If the party seeking for a new trial can carry his case the length of showing that some established fact is inconsistent with the case of the party who has obtained the verdict of the jury, and is consistent with that of the party seeking to set the verdict aside, there the Court may interfere with the verdict. I do not say that this is the only case—there are, no doubt, others; but unless some such case is made out, it will be very difficult to induce the Court to say that the verdict is so wrong that it must be set aside.

LINDLEY, L.J., and LOPES, L.J., concurred.

Appeal dismissed.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 13.

Judicial Abandonments.

Edward R. Bellerose, trader, Sorel, December 3.
Eugène Bourassa, hotel-keeper, Montreal, Dec. 3.
François Miville Déchène, dry-goods, Quebec, Dec. 11.
Henry Fairfield, Sweetsburg Nov. 26.
John Johnson & Co., hotel-keepers, Montreal, Dec. 6.

Edmond Lajoie, trader, St. Hyacinthe, Dec. 5.
Jean Évangéliste Turgeon, trader, Sherbrooke, Dec. 1.

Curators appointed.

Re Arpin & Frère.—C. Desmarteau, Montreal, curator, Dec. 3.
Re Edouard R. Bellerose, Sorel.—L. G. G. Béliveau, Montreal, curator, Dec. 9.
Re Eugène Bourassa.—C. Desmarteau, Montreal, curator, Dec. 10.
Re Henry Fairfield.—W. L. Smith, Pike River, curator, Dec. 5.
Re Z. Garneau, trader, Quebec.—H. A. Bedard, Quebec, curator, Dec. 5.
Re Gendron & Gauthier, Megantic.—M. B. McAulay, Sootstown, curator, Dec. 10.
Re N. H. Madden.—C. Desmarteau, Montreal, curator, Dec. 10.
Re Riopel & Hétu.—C. Desmarteau, Montreal, curator, Dec. 6.
Re F. B. Smith, Montreal.—Kent & Turcotte, Montreal, joint-curator, Dec. 10.

Dividends.

Re Amédée Bayard.—First and final dividend, payable Dec. 26, J. M. Marotte and P. E. E. de Lorimier, curators.
Re A. G. Elliott.—Interim dividend, payable Jan. 5, 1891, Kent & Turcotte, Montreal, joint-curator.
Re Fred. Moor & Co., Windsor Mills.—First and final dividend, payable Dec. 29, J. McD. Hains, Montreal, curator.
Re Robert Neill, Sheffington.—Second and final dividend, payable Dec. 30, A. W. Stevenson, Montreal, curator.
Re Damase Pageot, trader, St. Sylvestre.—First dividend, payable Dec. 29, H. A. Bedard, Quebec, curator.
Re George Robitaille, Quebec.—First and final dividend, payable Dec. 22, Kent & Turcotte, Montreal, joint-curator.

Separation as to property.

Olivine Lessard vs. Stanislas Payette, trader, Montreal, Dec. 9.
Thaïse Fournier dite Préfontaine vs. Magloire G. Pausé, trader, Montreal, Dec. 5.
Eléonore Sinclair vs. Daniel Angevine, clerk, Montreal, Nov. 4.

Separation from bed and board.

Angéline Dugrenier vs. Louis Bousquet, farmer, township of Ely, Nov. 21.

COLLECTION OF TAXES.—Sir James Mackintosh, who spent ten years in India, knew a rajah, a man of great acquirements and polished manners, who, when he was disappointed in the collection of his taxes of the sum he expected, ordered a pound of eyes to be brought him of those who had refused to pay the taxes.

The Legal News.

VOL. XIII. DECEMBER 27, 1890. No. 52.

Four executions have taken place in Canada within a few weeks, for the crime of murder. There is no reason to suspect, in any of these cases, that the verdict of the jury was founded upon doubtful evidence, or that the punishment was not due to the crime. But there is one point in connection with these cases which seems to be forced upon the attention of the most indifferent observer, and that is the necessity of imposing more stringent rules upon sheriffs and gaolers with reference to the communications which pass between convicted persons and the outside world. In almost every instance there has been a daily and hourly correspondence permitted between the prisoner and the reporters for the press, as well as others who have no immediate connection with the convict or his family. This publicity we have been accustomed to regard as an evil incident of the administration of justice in the United States, and its introduction into Canada should be strenuously resisted as tending to bring the authority of the law into contempt. The sheriff ought not to permit communication between his prisoner and anybody who chooses to make him a visit; still less ought he to permit the gaoler or turnkeys to gossip with reporters over every act and saying of the man awaiting execution. A monstrous example of the length to which the abuse has gone is afforded by the publication of the following telegram from Mr. F. X. Lemieux to Remi Lamontagne, who was executed at Sherbrooke on the 19th instant, for a murder committed in circumstances of unusual atrocity:—

"All my efforts are in vain: entertain no further hope. Men do not pardon, but God alone is truly merciful. With all my heart I wish you the courage necessary to bear the terrible trial. It is sad to die young, healthy and vigorous, but in fifty years the judge and jury who have condemned you will in their turn be judged and will not perhaps, like you, enjoy the advantage of being ready for death. Farewell forever, dear client, au revoir, in eternity. My children and myself

pray to the good God for you. I wished to go and see you, but remained here to endeavor to save you. I know you will die like a Christian and a brave man. Farewell!"

We do not wish to make any comment upon this extraordinary communication. It could only have been written under the influence of excitement, and was evidently not intended for publication. But what shall be said of a system which tolerates the communication of such matter to the reporters? How are judges and juries to perform faithfully and conscientiously their painful duty if they are exposed to such attacks? The occasion seems to call for a united and energetic remonstrance from the bench and from all who are interested in the proper administration of justice, and the adoption of regulations which shall render the repetition of such a scandal impossible.

In *Grome v. Globe Printing Co.*, which came before the Master in Chambers at Toronto, on the 5th of November, the question of the admissibility of the evidence of a witness under sentence of death was considered. The action was for libel growing out of a newspaper article in which, as the plaintiff charged, it was asserted that he was in some way connected with the murder of one Benwell. The article appeared subsequent to the trial and conviction of one Birchall for the murder of Benwell, and Birchall was at the time in gaol under sentence of death. The plaintiff desired to obtain the evidence of Birchall to establish that he (Birchall) had not said that the plaintiff was in any way connected with the murder of Benwell. The sentence of death was to have been executed on Birchall on the 14th of November, 1890. On the 4th of November, 1890, the plaintiff moved before the Master in Chambers for an order to examine Birchall as a witness in the case and to use his depositions at the trial, which would not take place in the ordinary course till after his execution. The defendant's counsel contended, *inter alia*, that Birchall was civilly dead, and was not a competent witness, and therefore that the order should not be made. *Regina v. Webb*, 11 Cox, 133, was cited. The plaintiff's counsel contended that all disabilities of witnesses are now

removed in Ontario by ss. 2 and 3 of the Evidence Act, R. S. O., c. 61. The Master in Chambers held, following *Reg. v. Webb*, that Birchall, being a person under sentence of death, was not a competent witness, and refused to make the order. This order, on appeal, was upheld by Chief Justice Galt, but other grounds were assigned.

COUR SUPÉRIEURE.

MALBAIE, 2 septembre 1890.

Coram GAGNÉ, J.

In re GEO. DUBERGER, failli, et DIVERS CRÉANCIERS, colloqués; et J. A. J. KANE, contestant.

Faillite—Frais privilégiés.

- JUGÉ:—1. *Que les frais d'ouverture et d'administration de la faillite ne sont pas en général faits dans l'intérêt des créanciers hypothécaires, dont les droits sont assurés.*
2. *Que les frais qui ont pour objet la conservation et la liquidation des biens immobiliers peuvent seuls être considérés comme frais de justice privilégiés.*

Jugement:—

“La Cour, etc....

“Attendu que le dit curateur a, dans son bordereau de collocation, réparti le montant total des frais de la faillite sur le produit de la vente des meubles et sur celui de la vente des immeubles, au *pro rata* du prix de vente des dits meubles et immeubles, par privilège et par préférence aux créanciers hypothécaires;

“Attendu que le contestant se plaint de cette répartition alléguant qu'elle a l'effet de faire payer par les créanciers hypothécaires, non-seulement les frais de vente des dits immeubles, mais encore la plus grande partie des frais de syndicat et de faillite, et d'empêcher le dit contestant d'être colloqué de sa créance hypothécaire;

“Considérant que cette manière de répartir les frais sans tenir compte de l'objet spécial pour lequel ils ont été encourus, est illégale;

Que les frais de faillite ne sont privilégiés sur les immeubles qu'autant qu'ils ont été faits dans l'intérêt de la masse hypothécaire, et que le privilège n'existe pas pour les frais qui n'intéressent que la masse chirographaire;

Que les frais d'ouverture et d'administration de la faillite ne sont pas en général faits

dans l'intérêt des créanciers hypothécaires, dont les droits sont assurés, et peuvent être exercés indépendamment de la faillite;

Que les frais qui ont pour objet la conservation et la liquidation des biens immobiliers, peuvent seuls être considérés comme frais de justice privilégiés, et que le curateur n'aurait dû colloquer que ces frais, par privilège sur le produit de la vente des immeubles;

Que le curateur n'a pas indiqué d'une manière suffisante dans son bordereau de collocation, l'objet spécial pour lequel les frais ont été encourus, et qu'il est impossible de constater d'une manière exacte quels sont les frais qui ont été faits dans l'intérêt de la masse chirographaire, et ceux qui l'ont été dans l'intérêt de la masse hypothécaire;

“Considérant néanmoins que le curateur a colloqué sur le produit de la vente des immeubles, la plus grande partie des frais généraux de la faillite, au détriment du contestant qui est créancier hypothécaire;

“Maintient la contestation, déclare irrégulier et met de côté, le bordereau de collocation préparé en cette cause, ordonne au curateur d'en préparer un nouveau, d'après lequel les frais de la faillite seront payés et colloqués sur le produit de la vente des meubles, sauf et excepté les frais de justice qui ont pu être faits au profit des créanciers hypothécaires ou dans leur intérêt, savoir, les frais et déboursés du curateur, nécessaires pour la conservation et liquidation des biens immobiliers, lesquels frais devront être détaillés suffisamment et seront colloqués par privilège et par préférence aux créanciers hypothécaires, sur le produit de la vente des immeubles, au *pro rata* du prix de vente des dits immeubles; les frais des procédures faites dans l'intérêt commun des créanciers chirographaires et hypothécaires, telles que les annonces de vente et autres s'il y en a, seront, dans les circonstances, répartis sur le produit de la vente des meubles et sur celui de la vente des immeubles, au *pro rata* du prix de vente d'iceux, et la balance du produit des biens du failli sera allouée à qui de droit—avec dépens contre le curateur.”

G. A. Kane pour le contestant.

Angers & Martin pour le curateur.

(C. A.)

COUR SUPÉRIEURE.

MALBAIR, 10 septembre 1890.

Coram GAGNÉ, J.

J. COUTURIER v. J. COUTURIER, et DUFOUR et COUTURIER, opposants.

Société—Saisie de la partie indivise d'un des co-associés.

JUGÉ :—*Que les biens d'une société, ni la partie indivise d'un des co-associés, ne peuvent être saisis, pour la dette d'un des co-associés.*

Jugement—

"Considérant que les effets saisis en cette cause sont la propriété des opposants, savoir, la société commerciale "Dufour & Couturier," et qu'ils l'étaient lors de la dite saisie ;

"Considérant que le jugement obtenu par le demandeur, n'a pas été rendu contre la dite société, mais contre l'un des associés seulement, savoir, le dit défendeur ;

"Considérant que le demandeur ne peut faire saisir les biens de la dite société, ni même la partie indivise du défendeur dans les effets saisis ;

"Maintient l'opposition en cette cause, etc."

Angers & Martin pour les opposants.

J. S. Perrault pour le demandeur.

(C. A.)

QUEEN'S BENCH DIVISION.

LONDON, Oct. 28, 1890.

THE MAYOR, ALDERMEN, AND CITIZENS OF MANCHESTER v. WILLIAMS.

Libel—Corporation—Power to Maintain Action.

Point of law set down to be disposed of before trial.

Action by the mayor, aldermen, and citizens of Manchester to recover damages from the defendant for a libel written and caused by him to be printed in the *Manchester Examiner and Times*, meaning as the plaintiffs alleged, that bribery and corruption existed in three departments of the Manchester City Council, and that the plaintiffs were either parties thereto or culpably ignorant thereof, and that the said bribery and corruption prevailed to such an extent as to render necessary an inquiry by a parliamentary commission.

The defendant objected that a municipal corporation could not sue in its corporate

capacity in respect of the alleged words in the sense complained of.

The Court (DAY, J., and LAWRENCE, J.) held that the action was not maintainable, and gave judgment for the defendant.

CHANCERY DIVISION.

LONDON, Nov. 10, 12, 1890.

Before KAY, J.

RICHARDS v. BUTCHER.

Trade-mark—Special and distinctive Words used before 1875—User as a Trade-mark—Association with other Words and Marks.

This was a motion to expunge two trade-marks, "Monopole" and "Dry Monopole," used in connection with champagne, and registered on July 28, 1882, by Messrs. Heidsieck & Co., of Rheims, under the Registration of Trade-marks Act, 1875, s. 10, as "a special and distinctive word or words used as a trade-mark before the passing of this Act." The motion was made on the grounds (1) that the words were not special and distinctive, and (2) that the words had not been used alone, but always in association with other words or marks. The alleged user related to labels, wrappers, corks, and cases. The label on each bottle bore the words "Monopole" or "Dry Monopole" in Roman letters, with the words "Heidsieck & Co., Rheims, established 1875," underneath in a running hand. The wrapper round each bottle was substantially similar to the label. The corks were branded on the sides with the words "Monopole" or "Dry Monopole," and on the bottom with a comet with "Heidsieck & Co." around it. The cases in which the wine was sold bore on one side the brand of "Monopole," and at one end the brand of "Heidsieck & Co.," in a circular or semi-circular form, and the word "Rheims" running across an anchor.

KAY, J., said that in order to register a word or words of this kind, not being fancy words, it was necessary that they should have been used, and used by themselves, as trade-marks before the passing of the Act; that the user of the word as a trade-mark meant the impressing of that word either on the goods or some wrapper or case containing the goods in such a way as that the public

would understand that the word alone was intended to be used as a trade-mark; that in none of the alleged instances of user now before the Court had the words "Monopole" or "Dry Monopole" been so used; and made an order accordingly, expunging the trade-marks in question, with costs.

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

[Registered in accordance with the Copyright Act.]

CHAPTER VIII.

INTERPRETATION OF THE CONTRACT.

[Continued from p. 403.]

The *proferens verba* in the Roman law (or stipulator) was the person to whom the stipulation was made. He put the question. The other answered. Burge Suretyship, p. 42. Yet words of warranty by an assured if written by the assurer, ought to be interpreted against the writer. (*Sed* is not the assured the writer of such?)

In *Notman v. The Anchor Insurance Co.*, 4 C.B. (N.S.) 476, the Court held the insurance company to be the *proferens*, and that interpretation was to be against it.

If obscurity be in an expression in a policy by the fault of the agent of the insurer, who wrote it, *semble* interpretation is to be against him, as against a seller.

"La rédaction de la police étant le fait des assureurs, les obscurités doivent être interprétées contre eux." No. 66, Rolland de Villargues, Ass. Terr.

Query? as to this rule. It might be so as regards the obligations assumed by the assurer by the policy. But query as regards obligations such as warranties assumed by the assured, or stated in the policy to be upon him. He ought to check the writing. The agent writing may, as regards such obligations, be held agent of the assured.

Where there is a covenant in a lease not to assign without the lessor's leave in writing first had and obtained, a parol license will be in vain (2 Troplong, Louage) unless admitted.

Roe exd. Gregson v. Harrison, 2 T. R., cited in *Espinasse's N. P. Ev.*

Ought the above to be? Yet is it ever unfair to hold that the parties most probably

meant what they expressed? that they could make that convention to have force between them as Code Civil has force for all?

In Judge Smith's case¹ it was otherwise judged. His builder was to have no claim for extras except he could produce an order, in writing. The builder took a parol order and asked Judge Smith on *faits et articles*, did you not order so and so? Judge Smith declined to answer, and the Court of Appeals condemned him, taking the question as answered in the affirmative, and himself liable though no order in writing was produced.

§ 218. Suretyship.

The contract of suretyship may be subject to a condition, so that the surety will be discharged if the condition be not performed by the creditor. In French law, interpretation is to be in favor of *cautions*. There are paid cautioners now, commonly.

Exceptiones assecuratorum, si aliquid dubii habent, non admittuntur. No. 94. 1 Disc. Casaregis.

Exceptions in policies are to be interpreted against insurance companies.²

Insurance is effected on wheat, corn, or pease in ship so and so; what is covered? Only wheat, only pease, only corn? Or all of them, in such quantities as may be? *Semble*, all; the interpretation being "whether wheat, corn, or pease."

Conditions are to be construed against those for whose benefit they are introduced.³

Arnould says the insured are to have the benefit of doubt.

Suppose a bond by a debtor for £500 repayable fifteen days after demand in writing upon him; surely verbal demand won't do.

¹ *Kennedy*, appellant, v. *Smith*, respondent, 6 L.C.R., Upon a building contract though no extra work is to be allowed except upon written orders of the proprietor, verbal orders by him will bind him, if they be proved either by written order, or by oath of the proprietor. The proprietor cannot refuse to answer on oath as to the orders. Art. 1793, modern C. C. orders writing for such extras, so oath cannot be according to Troplong; but Merlin *contra*. See *Mertin*, Police et Cont. d'Assurance.

² *Black:tt v. R. Exc. Ass. Co.*, 2 Cr. and Jer. *Palmer v. Warren Ins. Co.*, 1 Story.

³ *Catlin v. Springfield F. Ins. Co.*, 1 Sumner's Rep. 434.

Well, this is not a better case than is the insurer's often.

Where a lease contains a clause not to sublet but to tenants "qui conviennent au bailleur," the landlord cannot object whimsically, but must give good reasons for any objections by him, Journ du Pal.: of 1864, p. 1044. Approbation tacit by the proprietor makes him *non recevable* to contest the validity of the *sous bail*, (Ib.) note.—Vô. Bail § 9, Roll. de V. Subletting not to be but by consent in writing of the landlord; writing is not a condition essential of the consent; but consent verbal and commencement de preuve par écrit is as good. (Ib.)

This agrees with Pothier who says that contracts are to be interpreted in favor of the person who obliges himself to do anything, (yet is not the insurance company the person who obliges himself to pay?)

The insurer is a kind of *caution*. On the principle of his contract resembling suretyship, the interpretation ought to be against the insured, à la décharge de l'assureur. Suretyship may be *salaré*, bilateral, conditional.

§ 219. Examples of interpretation.

Suppose the insured to say that his house is connected with another by an opening in the wall between them, and the policy to go on to say that an iron door is to be placed there in May, (*no peine de nullité*.) Suppose the iron door to be placed only on 1st of June; fire to happen on 1st December following, in a general conflagration, *quid?* The company would have to pay.

Suppose in a policy, iron door be stated, a plan of it to be first approved of by this company, but door to be placed first, then the plan, and a letter stating that the door is placed, to be sent to the company's board of directors, who never complain, but are silent, surely the doctrine of ratification will rule, though the word "first" be in the (so-called) condition.

Bayley, J., says, in *Ritchie v. Atkinson*,¹ there would often be great injustice done by holding a clause a condition precedent, and none by a different construction.

§ 220. Conditions in policies sometimes directory.

May not some conditions in policies be

held (like clauses in statutes) rather *directory*, than other?

In 12 Wheaton, 81, Judge Story held that some of the provisions of the Charter of the Bank of the United States were directory, rather than conditions precedent; and that what are to be deemed one and what other must depend upon a sound construction of the nature and object of each regulation, and upon apparent intention.¹

In Frost's case² interpretation of statutes, (even in favor of life) will not be literal always.

Stat. of Treasons' end and object will be provided for, though its formalities will not have to be observed always. Yet in the Statute of Wills literal interpretation will be maintained.

Suppose a man to say, water on each "story"; would that include the basement or the attic? Or suppose he said, "each flat."³ In descriptions an insurance company might sometimes charge the insured with being false, and force him into having to argue that the basement is a story; e.g., if the insured were to describe a two story and basement as three stories.

Usage is admitted to explain doubtful words. See rules for meaning of words, 2 Dwarrris, "ut commune vulgus."

"In case of other insurance, notice to be given and endorsed upon the policy or approved in writing by the insurance company, else policy to cease." The insured made other insurance, and gave written notice which the secretary of the company acknowledged, but no endorsement in writing, nor approval in writing was made; yet the assured recovered. The letter of the contract was not carried out, yet the condition was sufficiently complied with by the assured, it was held.⁴

If I effect an insurance on my two houses Nos. 105 and 106, for \$4,000, does this work

¹ P. 579, Vol. 9, (1854) La Annual R.

² 2 Moody C. C. Res.

³ See 1 N. Y. Legal Observer, and 2 Parsons, pp. 48, 49, note. Dr. Johnson's Dictionary was referred to, for an explanation of the word "provisionally," 2 B. & P. New Rep.

⁴ 6 Hill, 147. Suppose other insurance on one of the subjects only, and not notified: would the policy be totally vitiated?

¹ 10 East.

to cover a loss of, say, \$3,000 happening to No. 105; or is the insurance to read \$4,000 on the two houses, to wit, \$2,000 on each? The two apparently are insured as one *corps*.

Suppose a condition in an insurance policy to read, "no furnace shall be introduced into said house without leave in writing of the insurers being obtained." Would parol license be no good, as in *Roe v. Harrison*.¹ Suppose the reading to be "previous leave in writing," and leave in writing be obtained after; surely that would do.² So here are examples of, 1st, literal interpretation; 2nd, non-literal interpretation.³

SUPERIOR COURT—MONTREAL.*

Capias—Assignment by debtor in trust—Demand of judicial abandonment—Art. 798, C. C. P.—Legal attorney.

Held:—1. Affirming the judgment of Wurtelle, J., M. L. R., 6 S. C. 234, That where a creditor, by filing his claim with the trustee and receiving dividend, has acquiesced in a voluntary assignment in trust made by his debtor for the benefit of his creditors, such creditor is estopped from demanding, immediately after, that the debtor shall make a judicial abandonment; and therefore he is not entitled to obtain the issue of a writ of *capias* on the ground that his debtor has refused to make a judicial abandonment.

2. An attorney *ad litem*, even when he holds a power of attorney "to take all such steps by legal proceedings or otherwise as he might think necessary," is not authorized, under Art. 798, C.C.P., to make the affidavit for *capias*, the "legal attorney" referred to in the article being not the procurator *ad litem*, but the procurator *ad hoc negotium*.—*Boston Woven Hose Co. v Fenwick*, in Review, Johnson, C. J., Jetté, Tellier, JJ., Nov. 15, 1890.

Municipal Law—Meeting of Municipal Council—Adjournment—By-law, Publication of.

Held:—When a general meeting of a muni-

cipal council, regularly summoned, has been properly adjourned to another day, the meeting held in pursuance of such adjournment is regular and legal, although not preceded by the notice required for the original meeting, the adjourned meeting being a continuation of the original meeting, and the two forming together but one session.

2. Where a *procès-verbal* has been on the table during the deliberation of the council thereon, and the members of the council and the persons interested therein who were present knew the tenor of such *procès-verbal*, it was not necessary to read the *procès-verbal*, the examination consisting in such case of the discussion with full knowledge of its contents.

3. Where it has been decided by a resolution that a councillor is not personally interested, such resolution is final and has full effect.

4. Where the notice given by the secretary-treasurer of the passing of a by-law is irregular and insufficient, such irregularity does not entail the nullity of the by-law, but merely suspends its going into execution until duly published.—*Provost v. Corporation de la Paroisse de Ste. Anne de Varennes*, Wurtelle, J., Sept. 1, 1890.

Railway Act—Expropriation—Indemnity to Proprietor—Trees felled near railway line.

Held:—1. The amount awarded for the right of way for a railway is compensation, under sections 146, 147 and 152 of the Railway act, 51 Vict. (D) ch. 29, not only for the land taken by the railway, but also for the damage likely to be occasioned to the proprietor during the construction of the railway.

2. Railway companies have the right, under paragraph (c) of section 90 of the Railway Act, to fell and remove trees which stand within six rods of the railway, and the damage which may result from the exercise of this right forms part of the damages to be covered by the compensation awarded to the person whose land is expropriated; and he has no action to recover any additional amount for the value of trees within this limit which may be cut down and removed by the railway company.—*Evans v.*

¹ 2 T. R. 425.

² Yet according to the English Law of Trustees it would not. See Hill on Trustees, p. 389.

³ If on change of name by a widow, loss of legacy is ordered by will, she does not lose the legacy if she marry with a man of the same name, though the testator meant to prevent her marrying again.

* To appear in Montreal Law Reports, 6 R.C.

Atlantic & North West R. Co, Wurtele, J., Sept. 1, 1890.

Jurisdiction—Right of Action—Art. 114 C.C.P.—Pleading—Costs.

Held:—Where the plaintiff, domiciled in the district of M., revendicates as his property goods in the possession of a person domiciled in another district, and alleged to be illegally detained by him therein, the defendant should be impleaded in the district of his domicile.

2. Where the action is manifestly beyond the jurisdiction of the Court, it will be dismissed, although no declinatory exception has been pleaded.

3. A person who intervenes in the suit (the defendant making default) in order to contest such seizure, may raise the question of jurisdiction by his plea to the merits without having filed a declinatory exception within four days from the allowance of his intervention; but in such case he will not be awarded costs on the intervention.

4. The intervening party in such case is not bound by any consent to the jurisdiction which may be proved to have been given by the defendant before the institution of the suit.—*Goldie v Beauchemin, & Rasconi*, intervening, Wurtele, J., Nov. 17, 1890.

Married woman, separated as to property, carrying on trade—Art. 981, C.C. P.—Registration.

Held:—Affirming the judgment of *Taschereau, J., M. L. R., 5 S. C. 112, 1*. In an action *qui tam*, under Art. 981, C.C.P., against a married woman separated as to property, for carrying on trade without registration as required by Art. 981, C.C.P., a general averment that the defendant carried on trade from the month of July to 30th September, 1887, is a sufficient allegation of the act of trading, and of the date: a statement of particular acts of trading is not necessary.

2. Art. 981, C. C. P., applies to women separated as to property by marriage contract as well as to those who have been judicially separated.

3. Art. 981 has not been repealed by 48 Vict. (Q.), ch 29.

4. The declaration required by Art. 981,

C.C.P., must be delivered to the prothonotary of the district and the registrar of the county, at the time the wife begins to carry on trade.

5. The action *qui tam* for failure to comply with the requirements of Art. 981, C. C. P. is distinct from the action for failure to comply with the requirements of 48 Vict. (Q), ch. 29, s. 1, and the two actions may co-exist against the same person.—*Devin v Vaudry*, in Review, Johnson, C. J., Gill, Wurtele, JJ., Nov. 30, 1889.

DECISIONS AT QUEBEC.*

Vente—Résolution—Impenses—Frais de poursuite.

Jugé:—La sentence qui prononce la résolution d'une vente pour défaut de paiement du prix, en vertu d'un pacte commissaire à cet effet, doit mettre à la charge de l'acheteur, défendeur, les frais de poursuite lors même qu'elle lui reconnait le droit à des impenses au montant de la balance qu'il doit.—*Plourde v Brisson*, en révision, Casault, Andrews, Larue, J.J., 31 oct. 1889.

Procédure—Assignment—Huissier—Parent des parties.

Jugé:—L'assignation faite par un huissier, neveu du défendeur, est nulle, attendu que l'article 74, C.P.C., défend aux huissiers d'exploiter dans les affaires qui concernent leurs parents jusqu'au degré de cousin germain inclusivement. Les mots, qui concernent, dans cet article, étendent la prohibition tant aux affaires contre, qu'à celles pour les parents, etc., et, en cela, l'article 74 diffère de l'article 66 du Code de Procédure Française qui ne défend à l'huissier d'instrumenter que "pour ses parents, etc."—*Cliche v Poulin*, C. S., Beauce, Pelletier, J., 13 mars 1890.

Contract—Principal and agent—Art. 1738, C.C.

Held:—A party who signs an agreement for services to a vessel stranded in the Gulf, as "agent by Capt. R's telegrams," is not liable under Art. 1738, C. C., as a factor of a foreign principal.—*Kaine v Gunn*, in Review, Casault, Andrews, Larue, JJ., June 27, 1889.

* 16 Q. L. R.

Jugement en révision—Pouvoir de la Cour de l'interpréter—Rectification du registre.

Jugé:—La Cour de Révision ayant confirmé, avec dépens, un jugement rendu contre le défendeur, dans une cause dans laquelle le demandeur avait appelé son garant qui avait pris son fait et cause, peut ordonner, sur motion du garant, que l'entrée de son jugement au registre soit rectifiée de manière à donner au garant ses frais en révision. Le pouvoir d'interpréter leurs jugements que la loi reconnaît aux tribunaux, doit être exercé par ceux qui les rendent et non par ceux auxquels ils sont transmis pour être exécutés.—*Lebel v Pelletier, & Lebel v Le Crédit Foncier*, en révision, Casault, Caron, Andrews, J.J., 28 fév. 1890.

Revendication—Procédure—Action contre Curateur aux biens.

Jugé:—Lorsque dans les biens dont un curateur prend possession comme appartenant au débiteur qui a fait cession, il s'en trouve qui appartiennent à des tiers, c'est par recours ordinaire à une action, et non par voie exceptionnelle de requête sommaire, que ces derniers doivent les revendiquer.—*St. Hyacinthe Oil & Paint Co. v Bédard, C. S.*, Casault, J., 28 fév. 1890.

Séparation de biens—Irrégularité de l'assignation—Connivence du conjoint poursuivi—Art. 974, C.P.C.

Jugé:—Le mari assigné en séparation de biens à comparaître un jour non-juridique, et qui consent au rapport du bref d'assignation le lendemain, est par là même de connivence dans la poursuite. Celle-ci est partant nulle, et le jugement qui l'a maintenue doit être annulé sur tierce opposition d'un créancier du mari.—*Roy v Duberger et Filion*, tiers-oppt., en révision, Casault, Caron, Andrews, J.J., 28 fév. 1890.

INSOLVENT NOTICES, ETC.

Quebec Official Gazette, Dec. 20.

Judicial Abandonments.

Jules Joseph Edgar Bergevin, trader, Quebec, Dec. 13.
Madame L. Lussier, milliner, Montreal, Dec. 12.
Joseph Lecompte, boot and shoe dealer, Montreal, Dec. 16.
Basile Massé, furniture dealer, St. Hyacinthe, Dec. 15.

Curators appointed.

Re E. Beaudry et al.—C. Millier and J. J. Griffith, Montreal, joint curator, Dec. 17.
Re John E. Bradford, trader, Lachute.—W. J. Simpson, Lachute, curator, Dec. 12.
Re Olvier Charbonneau.—Bilodeau & Renaud, Montreal, joint curator, Dec. 18.
Re Marie Louise Chartrand.—Bilodeau & Renaud, Montreal, joint curator, Dec. 18.
Re M. J. Dayet & Co., wine merchants, Quebec.—N. Matte, Quebec, curator, Dec. 16.
Re Napoléon Desjardins, baker, La Pointe au Pic, Mulbaie.—N. Matte, Quebec, curator, Dec. 15.
Re J. F. Dupré, grocer.—Bilodeau & Renaud, Montreal, joint curator, Dec. 17.
Re Joseph Aurèle Gendron.—P. Brieu and R. Stewart Farnham, joint curator, Dec. 15.
Re Jean H. Gendron.—J. T. L. Archambault and J. J. Griffith, Sherbrooke, joint curator, Dec. 11.
Re John Johnson & Co.—C. Desmarteau, Montreal, curator, Dec. 18.
Re E. F. Lavoie, Quebec.—D. Arcand, Quebec, curator, Dec. 15.
Re Victor Lesage, Pont Rouge.—H. A. Bédard, Quebec, curator, Dec. 15.
Re Robert T. Manley, trader, Lachute.—W. J. Simpson, Lachute, curator, Dec. 12.
Re Francis T. McCallister, Nicolet.—A. L. Marché and J. Frigon, joint curator, Dec. 16.
Re Pierre Ouellet and François Ouellet, grocers, Quebec.—P. Langlois, Quebec, curator, Dec. 11.

Dividends.

Re Thomas Barry, grocer, Quebec.—First and final dividend, payable Jan. 5, N. Matte, Quebec, curator.
Re O. Bégin, & Co., Quebec.—First dividend, payable Jan. 5, N. Matte, Quebec, curator.
Re François Bourgoing, Tadoussac.—First dividend, payable Jan. 5, N. Matte, Quebec, curator.
Re Drolet & Co., Quebec.—First and final dividend, payable Jan. 5, N. Matte, Quebec, curator.
Re C. N. Falardeau, l'ancienne Lorette.—Third and final dividend, payable Jan. 5, H. A. Bédard, Quebec, curator.
Re Z. Garneau, trader, Quebec.—First and final dividend, payable Jan. 5, H. A. Bédard, Quebec, curator.
Re Hubert A. Houde, grocer, Quebec.—First and final dividend, payable Jan. 5, H. A. Bédard, Quebec, curator.
Re Joseph L'Abbé, trader, Quebec.—First and final dividend, payable Jan. 5, H. A. Bédard, Quebec, curator.
Re Jean B. et Prosper Lafontaine, Chambord and Lake Bouchette.—First and final dividend, payable Jan. 5, J. B. E. Levesque, Quebec, curator.
Re Zéphirin Lafrance, hotel-keeper, Quebec.—First and final dividend, payable Jan. 5, N. Matte, Quebec, curator.
Re John McNiece.—First and final dividend, payable Dec. 30, E. H. Davis, Montreal, curator.
Re Montreal Shoe Co-operative Association.—First and final dividend, payable Jan. 5, C. Desmarteau, Montreal, curator.
Re J. W. Richards, Montreal.—First and final dividend, payable Jan. 12, Kent & Turcotte, Montreal, joint curator.
Re Alexis Therriault, Fraserville.—First dividend, payable Jan. 5, N. Matte, Quebec, curator.
Re J. B. A. Trudel & Co., Montreal.—First and final dividend, payable Jan. 5, J. McD. Hains, Montreal, curator.
Re Narcisse Turgeon.—First and final dividend, payable Jan. 5, J. Goulet, Lévis, curator.
Re James Willis Wight, Montreal.—First and final dividend, payable Jan. 5, J. McD. Hains, Montreal, curator.

Separation as to Property.
Rose Delima Dagenais vs. Wilfrid Landry, butcher, Ste. Scholastique, Dec. 10.

GENERAL INDEX TO SUBJECTS.

VOL. XIII.

[The cases of **QUEEN'S BENCH, MONTREAL, and SUPERIOR COURT, MONTREAL**, which are fully indexed in the regular series, are here placed separately under those titles. For matters noticed in departments of **CURRENT TOPICS, and GENERAL NOTES**, see under those titles in Index. For **TREATISE ON FIRE INSURANCE** see p. 417 *et seq.*]

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TREATISE BY THE LATE

MR. JUSTICE MACKAY.

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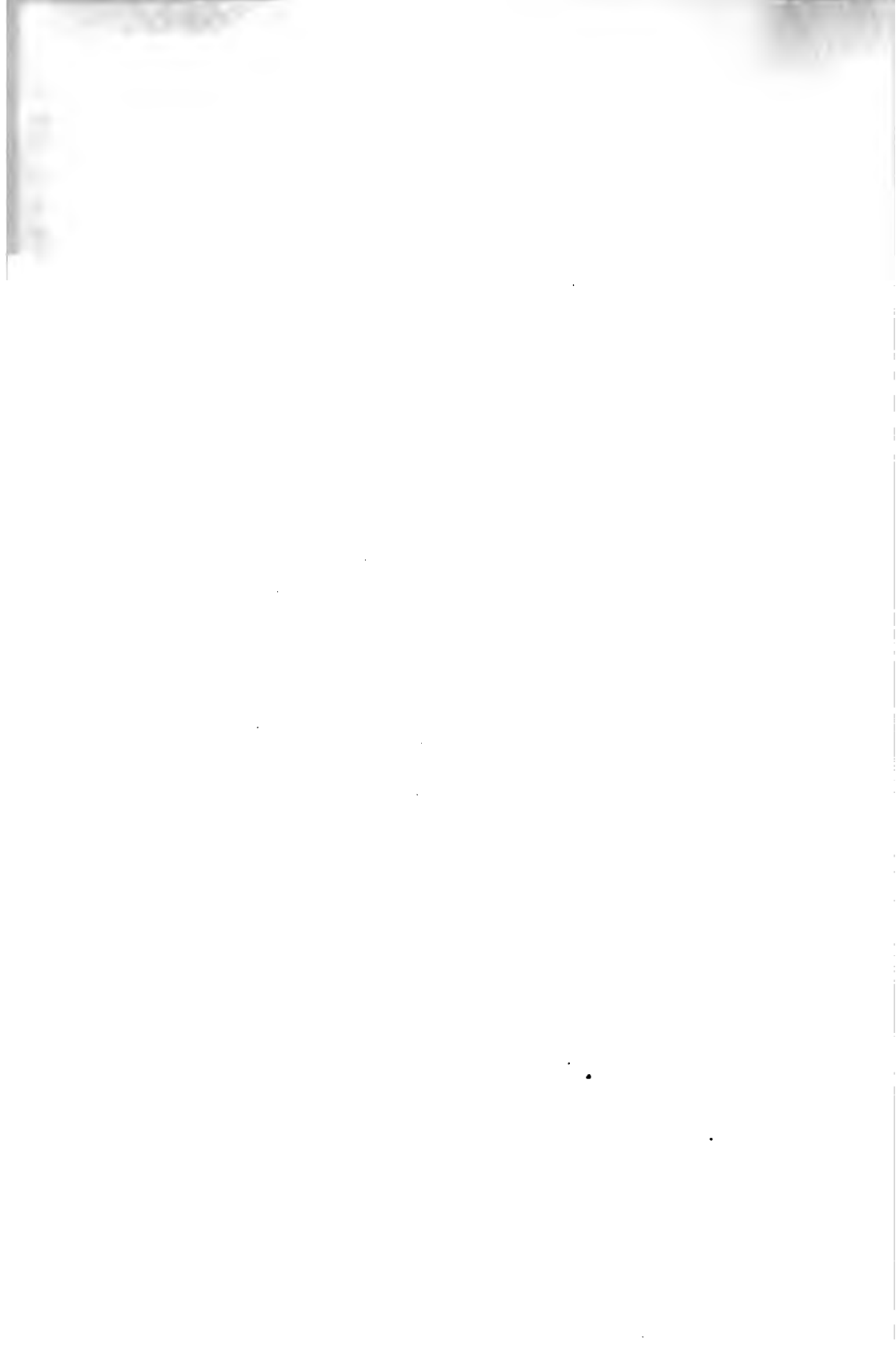
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